87-702

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-

EUGENE DONG, JR., M.D.
Petitioner

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY

and

JAMES B.D. MARK, M.D.

and

CLAYTON RICH, M.D.

and

JOHN SCHWARTZ

and

ZOLTAN LUCAS, M.D.

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

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## QUESTIONS PRESENTED

1. What are the appropriate tests and procedures for determining whether or not non-political speech receives absolute First Amendment Privilege?

2. What privileges are accorded scholars under the First Amendment?

3. Do State Privacy provisions improperly restrict Academic Freedom?

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii

Citation to Opinions Below . . . . . 1

Jurisdiction . . . . . 1

Constitutional Provision Involved . . . 2

Statement of the Case . . . . . 2

The Appeal . . . . . 9

Reasons for Granting the Writ. . . . . 14

The Fact/Opinion Distinction . . . . . 15

Academic Freedom . . . . . 36

Conclusion . . . . . 43

Appendix . . . . . 1

Opinion of the Court of Appeal

Appellant's opening brief excerpt

Petition for Hearing excerpt

TABLE OF AUTHORITIES

CASES page:

Adler v. American Standard Corp., 538 F.Supp. 572 (D.Md.1982) . . . . . 32

Baker v. Los Angeles Herald Examiner, 42 Cal.3d 254 (1986) . . 17, 21, 24, 28, 30

Board of Trustees v. Superior Court, 119 Cal.App.3d 516 (1981) . . . . . 8

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) . . . . . 35

Commonwealth v. Wiseman, 356 Mass. 251, cert. denied, 398 U.S. 960 (1970). . 42

Connick v. Myers 461 U.S. 138 (1982) . . 42

Cox Broadcasting Corp. v. Cohn, 95 U.S. 469,488 (1975) . . . . . 42

De Savitsch v. Patterson, 159 F.2d 15 (1946) . . . . . 33

Edwards v. Aguillard, _ U.S. _ (1987) . . 13

Franklin v. Leland Stanford Junior University 172 Cal.App.3d 322 (1985) . . 10, 11

Gariepy v. Pearson, 207 F.2d 15 (D.C. Cir.), cert. denied, 346 U.S. 909 (1953) 23

Gertz v. Robert Welch 418 U.S. 328, 339-340 (1974) . . . . . 16

Hutchinson v. Proxmire, 443 U.S. 111 (1978) . . . . . 25

Keyishian v. Board of Regents, 385 U.S. 589 (1967) . . . . . 37, 39

MacLeod v. Tribune Publishing Co. 52 Cal.2d 536, 547 (1959) . . . . . 22

Manbeck v. Ostrowski, 384 F.2d 970 (1967) 34

McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460, 1465 (D.C. Cir. 1983) . . . . . 23

Morgan v. Dun & Bradstreet, 421 F.2d 1241 (5th Cir.1970) . . . . . 34

Ollman v. Evans 471 U.S. 1127 (1985) . . 18

Ollman v. Evans 750 F.2d 970, 978 (1984) 17-19, 22, 23, 30, 31, 33, 34

Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971) . . . . . 42

Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) . . . . . 39

Porson v. Pojidaeff, 436 F.2d 293, (1970) . . . . . 35

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) . . . . . 42

Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) . . . . . 15

Sweezy v. State of New Hampshire, 354 U. S. 234 (1957) . . . . . 37

Time v. Hill 385 U.S. 374 (1967) . . 42

Towne v. Eisner 245 U.S. 418, 1918 . 28

Washington Post Co. v. Chaloner, 250 U.S. 290 (1919) . . . . . 22

Wright v. Jeep, 547 F. Supp. 871 (E.D. Mich. S.D. 1982) . . . . . 38

CONSTITUTION

First Amendment . . . . . 10

OTHER

Restatement §566 . . . . . 29

Eugene Dong, Jr., petitioner, respectfully prays that a writ of certiorari issue from this Court to review a judgement of the Court of Appeal, Sixth District, State of California in this proceeding on May 26, 1987.

## Citation to Opinions Below

The opinion of the Court of Appeal affirming the judgement of non-suit against petitioner as modified on denial of rehearing is reported at 191 Cal.App.3d 1572 and is contained in the appendix hereto.

## Jurisdiction

The judgement of Court of Appeal was entered on May 26, 1987. A petition for review by the California Supreme Court was denied July 22, 1987. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked

under 28 U.S.C. §1257(3).

Constitutional Provision Involved

The First Amendment provides in relevant part:

"Congress shall make no law ... abridging the freedom of speech, or of the press."

The Fourteenth Amendment provides in relevant part:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner, Eugene Dong, Jr., M.D., was an eminently successful transplant

researcher at Stanford University. He was promoted to associate professor with tenure in 1972 and was being compensated commensurately with his peers.

However, by 1979, petitioner still held the same academic rank; had been moved to a small office physically separated from his department; and was being compensated at only the 25th percentile for associate professors at Stanford. [Appendix A, p. 22]

In the intervening period, petitioner had undertaken a critical analysis of scientific publications of Dr. Zoltan Lucas, also a transplant researcher at Stanford University. [Appendix A, p. 8]. Petitioner's initial analyses of scientific fraud became the subject of two faculty committees. In 1975, at the express invitation of the second committee ["Feigen"], petitioner

submitted his analysis in writing circumstantially demonstrating that the Lucas data, published in journals and federal grant reports, were fabricated. [Appendix A, p. 10]. Over the next three years, Stanford prevented petitioner from confirming his discoveries by denying him access to the committees' reports and to the underlying data in Lucas' laboratory notebooks. [Appendix A, p. 12]. During this period, petitioner himself was subjected to legal threats, and to three successive investigations by Stanford of the same set of Lucas allegations about the scholarly integrity of publications, principally authored by Randall Morris in collaboration with petitioner and others. [Appendix A, p. 11]. Contemporaneously with the investigations, Stanford selectively published false information indicating to petitioner and the

government that petitioner's conclusion of scientific fraud by Lucas had been discredited by both committees. [Appendix A, p. 14].

Subsequently, petitioner obtained three sets of documents which revealed that Stanford was involved in a complicated cover-up scheme at the expense of his peace of mind, professional advancement and Academic Freedom. The first set consists of Lucas' June 1978 letter of accusation against him[1], together with the Feigen Committee Report of October 2, 1975, which, in turn, contained Lucas' earlier accusatory letter of July 1975[2]. Dr. Lucas' accusations were made possible

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[1] This letter is the subject of the Second Cause of Action for defamation, and of Stanford's 1978 investigation of appellant.

[2] This letter is the subject of the First Cause of Action for defamation.

because Stanford, contrary to its expressed policy of confidentiality, identified petitioner to Dr. Lucas as the source of the critical analyses of his publications. In its report, the Feigen Committee concluded that petitioner had discovered significant scientific errors and fabrications on the part of Dr. Lucas. The Committee discredited Lucas' research, found probable fraud, and recommended to Stanford that it commence formal proceedings against Dr. Lucas.

Petitioner's second set of "code-breaking" documents was obtained under the Freedom Of Information Act. It consists of National Institutes of Health (NIH) records which include that Federal agency's correspondence with Stanford. Petitioner learned that Stanford had falsely asserted to the NIH in December, 1976, that the Feigen Committee had

reconvened and issued a report, following a resubmission of information by Lucas and a (fictitious) Dean's review. [Appendix A, p. 15]. This phantom report was reported to contain a final conclusion that there was no "wrongdoing" by Dr. Lucas. The NIH documents also reveal that formal disciplinary action, ultimately imposed upon Lucas in 1979 by Stanford for falsification of his bibliography in reports to the NIH, had nothing whatsoever to do with the scientific fraud discovered by petitioner, and reported by the Feigen Committee. [Appendix A, p. 18].

Petitioner ultimately obtained the third and final piece of the puzzle, Lucas' laboratory notebooks as a result of participating in a lawsuit against Dr. Lucas by A. Baronio Martins, Ph.D. [Appendix A, p. 22]. Both petitioner and

a questioned documents examiner have testified in deposition to their opinions that, among other irregularities, the books contain forged entries.

In 1979, Petitioner filed a 6 count complaint for libel, emotional distress, invasion of privacy and breach of academic contract. [Appendix A, p. 23]. Discovery of certain materials was denied by The Court of Appeal on state constitutional privacy grounds. Board of Trustees v. Superior Court, 119 Cal.App.3d 516 (1981). After two summary judgment motions, in November 1984, the matter came to trial. On the first day of trial, Dr. Lucas moved, *in limine*, "to exclude evidence", as a matter of law, that his publications were privileged "opinion". Stanford moved *in limine*, to "limit the scope of trial". [Appendix A, p. 26].

On November 14, 1984, the trial court held that Dr. Lucas' publications were privileged opinion; that the FOIA/NIH documents were "absolutely privileged"; that the Laboratory notebooks and expert evidence were irrelevant, constitutionally privileged, and confusing; and that the Feigen Report was privileged. The Trial Court stated no basis for its exclusion of evidence relating to Stanford's investigations of petitioner. [Appendix A, p. 27].

The parties stipulated that petitioner's Trial Brief Statement of Facts would be treated as his Opening Statement; and, as abridged to conform to the Trial Court's evidentiary rulings, would be properly non-suited.

The Appeal

The grounds for appeal and which are the bases for this petition for

certiorari were that the First amendment was erroneously construed by the trial court in the fact/opinion distinction and that the evidence was wrongly excluded because it was relevant to the vindication of petitioner's academic freedom rights.

After the trial of the cause herein and before the submission of the appellate briefs, the Sixth District Court of Appeal filed its opinion in Franklin v. Leland Stanford Junior University 172 Cal.App.3d 322 (1985). Professor Franklin challenged his dismissal on grounds that his conduct was protected by the First Amendment and that the University regulations authorizing his discharge were unconstitutionally vague. Stanford expressly bound itself in State court proceedings to First Amendment standards as a restriction on

its power to terminate Franklin's employment.

Petitioner thereupon briefed fully the his academic freedom rights to the Court of Appeal. [Appendix B, p.1-29]. The Court of Appeal's opinions in response were the following:

1) "The high court has not yet addressed the extent of a university's autonomy in deciding 'who may teach.' ¶We are unwilling to allow that autonomy to be circumscribed by the views of a single professor, no matter how righteous he may be." [Appendix A, p.51-52]

2) After citing its own decision in Franklin, "[i]n the same vein, the right to speak freely does not compel and audience to attend or to listen. The opportunity for critical inquiry and analysis, vigorous advocacy, and dialogue, all in the pursuit of truth (if

it is that) will be discerned and accepted. Galileo's inquisitors, for example, refused to accept the fact that the earth circles the sun. Here the University may have had a duty to the federal government to investigate the possibility of fraudulent research accomplished at the expense of federal funds. It may have had an obligation to the public at large, and to itself, to maintain high ethical standards of research in its medical school. But it has no corresponding duty to Dr. Dong as an individual." [Appendix A, p.53-54].

3) "We cannot perceive that Dr. Dong's own academic freedom was otherwise curtailed. From all that appears in the record, Dr. Dong was at all times allowed to teach, to argue, to complain, and to pursue his own research; and he apparently is still employed at the

University's medical school.

"We cannot and do not express any opinion as to whether Dr. Lucas in fact did false research; that question is plainly beyond our ken. But even if we assume, for the sake of argument--an assumption purely hypothetical--that Dr. Dong was entirely correct in his assertions, we nevertheless conclude that he has no cause of action against the University on that ground. ... publicity brings its own reward."[emphasis added]. [Appendix A, p. 55-56]

In his California Supreme Court, Reply to Respondent's Answers to Petition for Review, Petitioner again raised his academic freedom rights on the grounds of this Court's decision in Edwards v. Aguillard _ U.S. _ (1987), which had been decided following the submission of the Petition for Review by the California

Supreme Court. [Appendix C, p. 1-3]. The petition was denied and this petition ensues.

**Reasons for Granting the Writ.**

The decision below exemplifies and contributes to the confused state of the law on the critical, recurring issue of distinguishing between constitutionally protected expression from defamation; and the application of a workable methodology to the issue when it arises in disputes among scholars and scientists in the hard sciences. This Court has not previously provided guidance on the applicable test for distinguishing between the actionable defamatory fact and protected opinion, (if indeed the distinction applies at all to disputes between two private individuals), and the appropriate procedures courts should employ in applying such a test in cases such as

petitioner's. This Court should take this opportunity to do so, for to do otherwise would deprive a most significant segment of our society of a fair opportunity to defend "the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

In addition, Petitioner respectfully urges this Court to grant certiorari with respect to petitioner's Academic Freedom claim not only because the Court of Appeal appears to have missed the point of the First Amendment but also because the privacy holdings create uncertainty as to the publishibility of the information in Petitioner's possession concerning the allegations of fraud.

The Fact/Opinion Distinction

A scientist who submits to university

officials documented requests for investigations of alleged public and scientific fraud resulting in multiple investigations is making factual statements, and should be held to account for libel consistent with the first amendment.

The foundation of the fact/opinion distinction derives from this Court's statement in Gertz v. Robert Welch 418 U.S. 328, 339-340 (1974) that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on the public issues.'"

This Court has not yet spoken on the manner in which the distinction is to be made. As a result, the Federal Courts of

Appeal have fashioned various "tests" with a variety of permutations. These were recently reviewed in Ollman v. Evans 750 F.2d 970, 978 (1984). After the appellate briefs in the instant case were filed, the California Supreme Court in Baker v. Los Angeles Herald Examiner, 42 Cal.3d 254 (1986) adopted the Ollman plurality's totality of the circumstances test for determining whether the "average reader" would view the statement as fact or opinion. They are 1) the common usage of the allegedly defamatory words, 2) the verifiability of the statements, 3) the context of the statements (within the publication) and 4) the broader social context into which the statements fit.

The difficulty with the 'totality of the circumstances' test is that the factors described are merely tools of linguistic analysis. They provide no

principled basis for a connection between the subject matter of the challenged speech and the values of the First Amendment. Petitioner believes that this defect is at the heart of Justice Rehnquist's dissent on denial of the writ of certiorari in Ollman v. Evans 471 U.S. 1127 (1985):

> "At the time I joined the opinion in Gertz, supra, I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the market place and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious 'of the rich and complex history of the struggle of the common law to deal with this problem.' Hill, Defamation and Privacy Under the First Amendment, 76 Colum.L.Rev. 1205, 1239 (1976)."

Thus in Ollman, the plurality

oversimplifies the issue when it states, "[I]n a word, Gertz's reasoning immunizes an opinion, not because the opinion is asserted about a public figure, but because there is no such thing as a 'false opinion'." Ollman, supra, at 976. This overlooks the articulated rationale in Gertz, i.e., that there is a basis for protecting opinion as part of an uninhibited, robust and wide-open debate about public issues and of a competition of ideas. The extension of an absolute privilege for certain types of speech outside the political arena, clearly should incorporate a threshold determination as to whether the parties are in fact engaged in a competition of ideas and a robust debate before entering into a complex linguistic analysis whether the speech is fact or opinion.

The simple, undisputed facts in this

case are that Defendant Lucas wrote the subject letters in secret and Defendants Mark, Schwartz and Rich circulated them in secret. [Appendix A, p. 10,11]. To this day, with the blessing of two Courts of Appeal [Appendix A, p. 68], petitioner has been denied any opportunity to debate or rebut any conclusions reached by the "Wilson Committee", which was secretly convened by Defendant Rich in response to those letters. [Appendix A, p. 20]. May parties such as these have it both ways -- May they circulate defamatory words in secret and obstruct a full and open debate on these issues, while still claiming the benefit of a First Amendment privilege? Petitioner's case illustrates the need for this Court to grant certiorari to address development of an appropriate value-based First Amendment test for the absolute privilege to be

accorded certain types of non-political speech.

Petitioner now turns to the procedural issue of whether the application of an absolute privilege is a matter of law to be decided by the Court. Although Baker, supra, at 260, asserts that it is a question of law, Ollman states that this Court has not ruled directly on the issue. The Ollman court justifies that position by asserting that this Court has decided that other questions derived from the First Amendment are to be decided as matters of law. In addition, the Court argues that "predictability of decisions, which is of crucial importance in an area of law touching upon First Amendment values, is enhanced when the determination is made according to announced legal standards and when a body of public case law furnishes published

examples of the manner in which these standards are to be applied." Ollman, supra, at 978.

The test for defamatory meaning is phrased in terms of the average reader: a "publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.' Washington Post Co. v. Chaloner, 250 U.S. 290, 293 (1919). "'That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.'" MacLeod v. Tribune Publishing Co. 52 Cal.2d 536, 547 (1959). The court must determine whether a communication is capable of bearing a particular defamatory meaning, but it is for the

jury to decide whether a communication, found capable of a defamatory meaning by the court, was in fact so understood by its recipient. Gariepy v. Pearson, 207 F.2d 15 (D.C. Cir.), cert. denied, 346 U.S. 909 (1953). McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460, 1465 (D.C. Cir. 1983).

The test for opinion is also phrased in terms of the average reader: "To evaluate the totality of the circumstances of an allegedly defamatory statement, we will consider four factors in assessing whether the average reader would view the statement as fact or, conversely opinion." Ollman, supra at 979. In Baker, the Court cited MacLeod, a pre-Gertz case, for the proposition that in making the opinion determination, "the court must place itself in the position of the hearer or reader, and determine

the meaning of the statement according to its natural and popular construction." Baker, supra, at 260. There does not appear to be any legitimate basis for assuming that a court is in a better position to perform the linguistic analysis leading to a determination of "opinion", than it is for determining whether the words are capable of a "defamatory meaning".

Indeed, in the environment of today's technological society, the opinion of the Court of Appeal herein proves just the opposite. In cases like Baker, the alleged defamatory material appeared in a newspaper of general circulation. The material was written by lay persons in such a manner as to make the news understandable to the general reader. Similarly, in one of the few cases of libel to reach this Court involving a

scientist, Hutchinson v. Proxmire, 443 U.S. 111 (1978), the criticism contained in Senator Proxmire's Golden Fleece award was written not by scientists, but by lay persons for popular consumption. The operative presumption is that trial and appellate judges are members of and can identify with, the class of general "average" readers.

On the other hand, Dr. Lucas wrote his defamatory material for a specific, scientific audience. The trial judge was a scientific layman, and therefore disabled *ab initio* from assuming unassisted the position of the average reader of the letters at issue. The opening sentence of the opinion of the Court of Appeal, describing the defamatory July 24, 1975, letter proves this point:

> "Dr. Lucas' letter to Professor George S. Feigen, dated July 24,

> 1975, is typewritten, single-spaced, and five pages long minus exhibits. It contains a considerable body of scientific data and description which we are unable to evaluate[;]." (emphasis added) [Appendix A, p. 31].

Therefore, by its own admission the Court of Appeal was wholly disqualified from assuming the position of the reader and performing the required "context" analysis in the "totality of the circumstances" test.

Furthermore, the Court of Appeal observed that "Dr. Lucas enclosed eleven exhibits with the letter" [Appendix A, p. 34], but that it had only the letters "minus exhibits" before it [Appendix A, p. 31]. Therefore it was both a physical and an intellectual impossibility for either the Trial Court or the Court of Appeal to stand in the shoes of the recipients of these letters.

The "totality of the circumstances"

test is a linguistic analysis whose cornerstone is the mandate that the evaluator assume the position of the average reader and avoid viewing the material with a mind trained in law. As illustrated by the facts herein, it appears that courts of general jurisdiction are incompetent to evaluate the complex, technical language of science and medicine. In this circumstance, it is beyond comprehension, that the Court of Appeal denied both discovery and admission of direct evidence about the actual recipients of Dr. Lucas' letters, (the Wilson Committee and the Feigen committee) and substitutes its own speculative evaluation. Therefore the issue should be reserved for the trier of fact.

In connection with this point,

"Next, the context in which the statement was made must be considered.

> Since '[a] word is not a crystal, transparent and unchanged, [but] is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used[,]' the facts surrounding the publications must also be carefully considered. (See Towne v. Eisner 245 U.S. 418, 1918.) ¶This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." Baker v. Los Angeles Herald Examiner, *supra*, at 261.

This directive in Baker to consider the facts surrounding the publication clearly creates a new relevancy consideration in the fact/opinion inquiry. The class of evidence is the set of evidence relevant to understanding how Dr. Lucas' audiences understood his words and what Dr. Lucas intended by those words, which is underlain by the factual questions of what he was responding to and what his purpose was. Thus, if Dr. Lucas asserts in his publication that he is accusing

Petitioner of "practicing the same things he [Petitioner] accused Dr. Lucas of," [Appendix A, p. 32], then it is clear that the Court is bound to receive evidence of Petitioner's accusations. When Dr. Lucas makes assertions as to how the Feigen Committee received his allegations, then the evidence of the members of the Feigen Committee themselves, as well as their report, is relevant. [Appendix A, p. 38]. Therefore, given new relevancy considerations, the Feigen Report, the NIH documents, the Wilson committee activities, and the forensic evidence of scientific fraud should all be admissible as relevant to the fact-opinion determination in this case of professional defamation.

In addition to the "totality of the circumstances" test, the Court of Appeal invokes Restatement §566 to hold broadly,

that the "letters"[3] did not constitute actionable statements of opinion when the facts supporting the opinion are disclosed". The Court then stated the letter "did not imply there were undisclosed defamatory facts which prompted the writing. Instead the apparent aim of the letter was to set forth the precise information upon which Dr. Lucas' "belief" was based. Where the facts supporting a statement are

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[3] Appellant's complaint alleged that nine different, specific statements in two letters published over a three year period were actionable defamation. [Appendix A, p. 23-24]. Each statement is independently actionable, and if any one of them was not protected opinion, appellant was entitled to proceed to jury trial. Baker did not address this issue because there was only one statement at issue. It is clear from the discussion in Ollman that the members of the Court evaluated each alleged defamation separately in the context of the entire article and ruled with respect to each one. Here, the Court of Appeal held erroneously that the letters in their entirety were opinion.

disclosed, courts have found such statements to be non-actionable opinion." [Appendix A, p. 34-35].

There are two critical defects in the Court's holding. The first is that the proceeding at trial was a Motion in limine and therefore no "facts" were adduced [Appendix A, p. 27]; and, as the Court of Appeal admitted, it could not evaluate the "data" upon which Lucas' alleged "belief" was based [Appendix A, p. 31].

Secondly, the approach for analyzing statements which imply undisclosed facts is considerably different from the process of interpreting statements associated with disclosed facts. The fullest exposition of this distinction is found in the dissent in Ollman by Chief Judge Robinson:

> "This balancing of First Amendment and defamation implications of hybrid

statements works flawlessly where the critical background facts are accurately set forth. A significant imbalance results, however, when a hybrid statement appears without any recitation of the underlying facts, or when those facts are stated incompletely or erroneously.[68] When that is the case, the reader is unable to place the author's judgment in perspective, because he either is completely unaware of the predicate facts or is in some degree misled as to what they are. False hybrid statements obviously can wreak considerable damage to reputation.[69]

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[68] See Adler v. American Standard Corp., 538 F.Supp. 572, 576 (D.Md.1982) ["there is a distinction between simple opinions and expressions of opinion which indicate that they are based on undisclosed facts"]

[69] [Which is exactly what Dr. Lucas' defamatory statements were. The harm of which] has long been recognized: "To state accurately what a man has done, and then to say that in your opinion such conduct is disgraceful or dishonorable, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging himself for (sic ) the character of the conduct condemned, nothing but a false picture being presented for

> A reader supplied with no background at all may well assume that there are facts which support the derogatory conclusion, particularly if it is announced by the author with apparent assurance. [Footnote omitted]. A reader given materially incorrect or incomplete facts, mistakenly supposing that the pertinent data are accurately assembled before him, might give even more credence to the author's conclusion. [Footnote omitted] Hybrid statements unaccompanied by any predicate facts, or attended by defective recitals of the underlying facts, thus should occupy a very different position in the concerns of libel law, for their claim to First Amendment protection is far less compelling. If the background data reaching the reader are deficient, the hybrid statement is as much a representation of the facts it implies as it is a judgment or interpretation of the communicated data."[Emphasis added] Ollman, supra, at 1023.

Even if the fact/opinion determination is ultimately one of law for the court, it is well settled that it is up to the jury to settle any evidentiary disputes

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judgment." De Savitsch v. Patterson, supra note 64, 81 U.S.App.D.C. at 360, 159 F.2d at 17, quoting Christie v. Robertson, 10 New S. Wales L.Rep. 157.

over the facts upon which the legal conclusion is to be based. Ollman, supra at 1028:

> FN97. While I agree that the question whether a statement is one of fact or of opinion is to be decided by the court as a matter of law, see Maj. Op. at 978, it is up to the jury, if it is the trier of fact, to settle any evidentiary disputes over the facts upon which the legal conclusion is to be based. See Manbeck v. Ostrowski, 128 U.S.App.D.C. 1, 5, & n. 20, 384 F.2d 970, 974 & n. 20 (1967), cert. denied, 390 U.S. 966, 88 S.Ct. 1077, 19 L.Ed.2d 1170 (1968) (whether communication is privileged a question of law for court "where the facts surrounding its publication are undisputed"); Morgan v. Dun & Bradstreet, 421 F.2d 1241, 1242 (5th Cir.1970) ("(w)hen the evidence material to the privilege is in dispute, the trial judge is quite correct in submitting it to the jury"); Prosser & Keeton on Torts s 115 (5th ed. 1984) ("(w)hether the occasion was a privileged one is a question to be determined by the court as an issue of law, unless of course the facts are in dispute, in which case the jury will be instructed as to the proper rule to apply"). Two possible questions in this connection for the trier of facts are whether a hybrid statement predicated upon

> unreasonably inaccurate or incomplete background data actually conveyed a defamatory message to its audience, and, if so whether the author was culpable in making the error or omission creating the deficiency. Cf. Bose Corp. v. Consumers Union, supra note 87, --- U.S. at ----, 104 S.Ct. at 1958-1959, 80 L.Ed.2d at 515 (issue of malice is a question of fact); Porson v. Pojidaeff, 141 U.S.App.D.C. 139, 140-141, 436 F.2d 293, 294-295 (1970) (truth of statement is jury question); ...."

The Court of Appeal further holds that an In Limine Motion is the proper procedural vehicle for summary adjudication of issues predicated on First Amendment values. As far as petitioner can tell, this is a novel and unprecedented means of constitutional adjudication, never approved by this Court.

The Trial Court's ruling stemmed from a procedure that had no basis in precedent or statute. Such judicial improvisation and subjectivity may have

been efficient, but it was in no way consistent with the dictates of fundamental fairness and procedural due process. If efficiency in constitutional litigation is to be the norm, then this Court should grant certiorari and so inform defamation plaintiffs. If it isn't then this Court should grant certiorari to return the case for a trial on the merits.

Academic Freedom

Petitioner urges this Court to grant certiorari to consider two important issues raised by the decision of the Court of Appeal concerning Academic Freedom. The first question relates to the values which the constitutional right protects. The second concerns the prior restraints imposed on the freedom to publish admittedly controversial data by State Constitutional Privacy provisions.

Up to this decision, Academic Freedom has been considered a constellation of freedoms, consisting of the freedoms to teach, to think, to inquire, to dispute on the basis of facts, and to publish. It is the freedom to pursue truth wherever the path leads. Sweezy v. State of New Hampshire, 354 U. S. 234, 250 (1957). In Keyishian v. Board of Regents, 385 U.S. 589, 683 (1967) this Court said:

"The classroom is peculiarly the 'marketplace of ideas.' " 385 U.S. at page 603.

In this marketplace, it had been thought that access to data and the free exchange of same were considerations of the highest magnitude: This value is reflected in the long-standing policy of the University which petitioner relied on in the Courts below:

Secrecy in Research: "Resolve: 1. That the principle of openness in

research--**the principle of freedom of access by all interested persons to the underlying data, to the processes, and to the final result of research--is one of overriding importance.** [Appendix B, p. 2]

This value was not limited to this University, as was reflected by the decision of the Court in Wright v. Jeep, 547 F. Supp. 871 (E.D. Mich. S.D. 1982):

> "The value of the conclusions turns on the quality of the data and the methods used by the researcher in his analysis of that data as well as the skill and perception of the researcher. So if the conclusions or end product of a research effort is to be fairly tested, the underlying data must be available to others equally skilled and perceptive. *** [¶]The protection of the First Amendment is designed to afford the right to write and to speak. It does not give a right to withdraw material written and published from public scrutiny, nor does it give a right to refuse to disclose facts discovered as a result of observations that are relevant in making a judgment as to the correctness of the researcher's published conclusions." 547 F.Supp. at pp. 874-75.

Furthermore, it has been held by prior cases of this Court that the First

Amendment values were so important that mere investigations or threats of sanctions which chill the exercise of First amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. Keyishian v. Board of Regents, supra, 385 U.S. at 603.

In Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) summary judgment on a medical school professor's First Amendment claim against his employer was reversed, and the case remanded for full evidentiary trial on the issue of motivation for his dismissal:

> "As a result, Peacock's First Amendment causes of action necessarily involve complicated questions of motive and intent. A fair resolution of these difficult issues requires a full trial on the merits. Indeed, we have recently reiterated that **'the decision as to an employer's true motivation plainly is one reserved to the trier of fact.'** [citations omitted]. For this reason, courts have

> traditionally held that summary judgment is inappropriate when 'questions of motive predominate in the inquiry of how big a role the protected behavior played' in the employment decisions. [Citations omitted] Without a searching inquiry into these motives, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of *post hoc* rationalizations." 694 F.2d at page 646 [Emphasis provided].

However, this Court of Appeal views Academic Freedom quite differently. The court indicates that the First Amendment "autonomy" of a University is threatened by a single professor daring to demand information on another charged with fraudulent science. [Appendix A, p. 52]. This Court of Appeal indicates that individual scholars have no right to second guess the accuracy of the publication of any other scholar, fraudulent or not, by an independent evaluation of the original data. [Appendix A, p. 47]. This Court of Appeal

holds that a State right of privacy of administrators is more important than the academic freedom of the scholar to engage in an open and vigorous debate on academic matters. [Appendix A, p. 47] The decision is clearly a departure from the cases cited above, and this Court should address the institutional tilt it reflects.

Finally, this Court should grant certiorari to evaluate the prior restraint effects on publication when laboratory animal research information is held to be protectible under state constitutional privacy provisions.

Prior decisions of this Court indicate that "Privacy" concerns carry a very heavy burden when held up against First Amendment rights in matters of public concern. This Court has reserved judgment only on the issue of whether or

not publication of truthful "intimate" facts which outrage community "notions of decency" may be punished under State privacy laws. Time v. Hill 385 U.S. 374,383 (1967), Footnote 7. Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971). Cox Broadcasting Corp. v. Cohn, 95 U.S. 469,488 (1975). See also, Commonwealth v. Wiseman, 356 Mass. 251, *cert. denied*, 398 U.S. 960 (1970). Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). Actions for invasion of Privacy may not be maintained when the expression is of a kind that is of **"legitimate concern to the public"**. Connick v. Myers 461 U.S. 138 (1982).

In this case, the Court of Appeal let stand the holding that the "lab books and the evidence regarding the research and scientific work by Dr. Lucas" would be excluded from evidence. 'The Court finds

it is not relevant and that in light of the Constitutional right of privacy it should be excluded.' [Appendix A, p. 41]. Now, petitioner has that evidence in his possession. It is obviously controversial and about a public matter. Shall petitioner publish and face an 'invasion of privacy' constitutional tort, or censor myself and go away?

## Conclusion

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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EDITOR'S NOTE

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Supreme Court, U.S.
FILED
OCT 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-

EUGENE DONG, JR., M.D.
Petitioner

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY

and

JAMES B.D. MARK, M.D.

and

CLAYTON RICH, M.D.

and

JOHN SCHWARTZ

and

ZOLTAN LUCAS, M.D.

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

EUGENE DONG, JR. M.D.
In Pro Per
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Palo Alto, CA 94303
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APPENDIX

191 Cal.App.3d 1572

H000326.

In The Court of Appeal,

Sixth District. May 6, 1987.

As Modified on Denial of Rehearing

May 26, 1987.

Review Denied July 22, 1987.

This is an action for damages for libel, infliction of emotional distress, and breach of an implied covenant of good faith and fair dealing. The principal question which seems to confront us is this: If a prophet believes himself to be without honor in his own country, can he recover personal damages from those who heed him not? Certainly this idea would have intrigued the ancients;[1] but we conclude that even in this litigious age

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[1] Among others, Amos, Daniel, Elijah, Ezekiel, Hosea, Isaiah, Jeremiah, Joel, Jonah, Micah, Obadiah, and Samuel come to mind. Even Cassandra might have expressed an interest.

the time for the idea has not yet arrived.

I.

This case reaches us by an irregular route. Plaintiff Eugene Dong, Jr., M.D. brought suit against Stanford University's Board of Trustees and certain individual defendants. On the date set for trial, before the jury was impanelled, the defendants made a series of motions in limine, seeking to exclude documentary evidence to be offered by Dr. Dong. The trial court granted all defense motions. Thereafter Dr. Dong's counsel said: "It is my view if I right now waived a jury and stood over there and made an opening statement[,] based upon the things you have excluded [,] that you would be in a position to nonsuit me. ¶I'd like to save myself that breath and basically submit as an opening statement

my statement of facts which is Exhibit A to the trial brief with the excision of the things in there that Your Honor has legally excised this morning. It would be my view that what would be appropriate at that point would be nonsuit with respect to the causes of action, we would then have a tightly packaged record to do with whatever we might decide is appropriate." This suggestion was accepted by defense counsel, and so the court ruled as follows:

"It's stipulated then in light of the Court's rulings and only because of the Court's rulings on the motions in limine that Counsel stipulate that a nonsuit would be granted, given the offer of proof of the opening statement of Plaintiff being Exhibit A to the Plaintiff's trial brief.... ¶Based upon that the Court grants a nonsuit to each

of the defendants." Judgment was entered in favor of all defendants, and from that judgment Dr. Dong appeals.

We entertain this appeal because this state's Supreme Court has held that "there is an exception to the rule that a party may not appeal a consent judgment. If consent was merely given to facilitate an appeal following adverse determination of a critical issue, the party will not lose his right to be heard on appeal." (Building Industry Assn. v. City of Camarillo (1986) 41 Cal.3d 810, 817, 226 Cal.Rptr. 81, 718 P.2d 68).

In connection with a motion for nonsuit upon an opening statement, a trial court "must accept as true all of the facts set forth in the statement, must give those facts all the value to which they are legally entitled, and must indulge in every legitimate inference

which may be drawn therefrom." (Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal.App.3d 860, 867-868, 86 Cal.Rptr. 359.) "¶In an appeal from a judgment of nonsuit, the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff." (Carson v. Facilities Development Co. (1984) 36 Cal.3d 830, 839, 206 Cal.Rptr. 136, 686 P.2d 656.) In this case we hold that the trial court ruled correctly, and that the judgment should be affirmed.

II.

A. Dramatis Personae

Before addressing the facts we pause to introduce our cast.

Dr. Eugene Dong, Jr., the plaintiff, is a physician and a faculty member of Stanford University's school of medicine. Defendant Zoltan J. Lucas, M.D., was once

a faculty member at the University's school of medicine, but he is no longer so employed. Defendant Clayton Rich, M.D., is the dean of the University's medical school and vice president for medical affairs. Defendant James B.D. Mark, M.D. was at one time acting chairman of the department of surgery at the University's medical school. Defendant John J. Schwartz is a lawyer, counsel for medical affairs and assistant vice president of the University.

The University was made a party defendant apparently on the basis that it was vicariously liable, under the doctrine of respondeat superior, for the acts of individual defendants.

B. The Opening Statement Summarized

"Eugene Dong, Jr., M.D., joined the Stanford faculty in July, 1966. He was employed, pursuant to an oral contract,

by the School of Medicine as a researcher and teacher in the Department of Cardiovascular surgery." One of his duties "was to participate in the maintenance of high ethical standards in research." He rose through the ranks of instructor, assistant professor, and associate professor; and in 1972 he was appointed associate professor of cardiovascular surgery "with tenure." "During the late sixties and early seventies, Dr. Dong was a principal in a Stanford research team that developed a worldwide reputation in heart transplantation. During this period he acted as principal or co-principal investigator in research programs supported by millions of dollars of public and private funds." "Dr. Dong's rate of advancement ... had been at least equal to, if not more accelerated than

his peers'."

In early 1973 Randall Morris, a graduate student who had been engaged in research under Dr. Lucas, informed Dr. Dong that "[Dr.] Lucas was reporting scientific conclusions that were not supported by work done or data actually derived."

In June of 1973 Dr. Dong wrote to Dr. Robert A. Chase (chairman of the department of surgery) detailing the Morris allegations. Dr. Chase appointed an ad hoc committee of tenured faculty members (headed by a Dr. Raffel) to investigate "the Morris charges as presented by plaintiff."

In January of 1975 "the then acting Chairman of the Department of Surgery, [defendant] Dr. [James B. D.] Mark, informed plaintiff that the Raffel committee had reported its findings in

March of 1974 and had concluded that the information supplied to the committee did 'not support Professor Dong's assertions as to the publications in question.' " Dr. Mark indicated in his letter "that the Department of Surgery would take no further action in the matter." "Dr. Dong was not interviewed by the committee, and, to Dr. Dong's knowledge, the committee did not examine the laboratory data underlying the conclusions in question."

"With this response to charges he believed to be valid, Dr. Dong began to be concerned about his own ability as a scientific analyst, and about his position as a discredited challenger of the honesty of the work of a fellow scientist."

Then in February of 1975, A. Baronio Martins, Ph.D., who had been engaged in

research under Dr. Lucas, "wrote Dr. Mark with a whole new set of allegations concerning the validity of certain research performed by [Dr.] Lucas." "Dr. Mark appointed another ad hoc investigatory body, the Feigen committee [headed by Professor George A. Feigen], to review Martins' charges." That committee requested the assistance of Dr. Dong in analyzing the charges. Dr. Dong, Martins, and Randall Morris all testified before the committee.

On July 24, 1975, while the Feigen committee was still investigating, Dr. Lucas responded in kind. He "wrote a letter to the Feigen committee accusing Dr. Dong of 'consumer fraud,' 'public fraud,' and 'scientific fraud' in connection with certain papers Dr. Dong had [previously] co-authored. [Dr.] Lucas has testified under oath in another

lawsuit that he didn't have any evidence to support these charges against Dr. Dong."

Dr. Dong remained unaware of Dr. Lucas' challenge until November of 1978.

The Feigen committee submitted its report to Dr. Mark in October of 1975. In its cover letter the committee noted the charges made by Dr. Lucas against Dr. Dong ["These allege that Professor Dong was guilty of the same type of behavior that he attributed to Dr. Lucas"], but ignored them ["We did not examine these allegations but include them for the record"]. In its Summary Analysis and Recommendations the committee wrote about Dr. Lucas: "Beyond this, the question of fabrication and fraud is unresolved. We are of the opinion that it may have occurred as Professor Dong alleges. Circumstantially there was 'motive' for

some of the errors. On the other hand, there would appear to be little gain for Professor Lucas in the case of the majority of errors. In these cases it seems more likely that he was careless or incompetent, rather than guilty of fraud. We conclude that while the case for fraud has not been established beyond a reasonable doubt we maintain deep concern that some of the work may in fact have been fraudulent. We therefore recommend to you that a formal hearing to determine these questions of motive should be concerned." The committee unanimously agreed "that there exist sufficient grounds for the continuation of the inquiry by an appropriate agency of the University." But the inquiry was never continued.

Dr. Dong was unable to obtain a copy of the Feigen report from the University,

despite his repeated requests. He offered to provide the Feigen committee with additional evidence of errors in Dr. Lucas' research. That evidence was declined. In January of 1976 Dr. Mark wrote to Dr. Dong that the Feigen committee "is considering further information and I expect that they will report to me in due course."

"On February 11, 1976, [Dr.] Lucas wrote to Norman Shumway, M.D., Chairman of Dr. Dong's academic department, and accused Dr. Dong of fraud in scientific research. [Dr.] Lucas demanded an investigation of these charges. Dr. Shumway in fact requested a response [from] Dr. Dong, and, apparently satisfied by this response, pursued the matter no further."

Meanwhile Dr. Dong began communicating with various officials of

the National Institutes of Health (NIH) of the Department of Health, Education, and Welfare. NIH instituted its own investigation, and began a series of communications with University officials.[2] In April of 1976 the University's counsel, John Schwartz, told NIH officials that the Raffel committee's report had been rejected by the University as "unsatisfactory," and that

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[2] On January 30, 1976 NIH issued a memorandum which said, among other things: "NIH has reviewed Dr. Dong's allegations that Dr. Zoltan J. Lucas introduced serious discrepancies in certain grant applications and in a contract proposal. It is our conclusion that with a single exception there are no discrepancies in the data or use of the data as presented by Dr. Lucas." "There also appears to be no pretense of deception or attempt at withholding relevant data from NIH reviewers." (Emphasis in original.) A copy of the NIH memorandum was sent to Dr. Dong on March 9, 1976, and he thereafter complained to NIH that its report was superficial. Yet these facts were not mentioned in Dr. Dong's opening statement.

the Feigen committee's report had not been released because that committee was still in session. In May of 1976 Schwartz told NIH officials that Dr. Dong was a "complainer" and had a "vendetta" against Dr. Lucas. In December of 1976 one of Schwartz' assistants wrote to NIH that the Feigen committee "was reconvened and has submitted a report to James B.D. Mark, M.D., Acting Chairman of the Department of Surgery. This report is presently being reviewed by Dr. Mark and other appropriate University officials, and some points in the report need to be clarified with the committee before it will be ready for final distribution." But in fact there was no reconvening of the Feigen committee, and there were no points which remained to be clarified. "Stanford just didn't want to tell NIH what the Feigen committee had really

concluded and recommended. The truth was being covered up."

In March of 1977 one of Schwartz' assistants told the NIH that the Feigen committee "had submitted their report and found sloppy data but no illegal actions." In May of 1977 the same assistant told NIH that the Feigen committee "concluded, in general, that Dr. Lucas was not guilty of any fabrications or fallacious research reporting but perhaps guilty of sloppy laboratory administration." He further told NIH that a new head of the department of surgery, Dr. John Collins, would review the committee report.

Then in June of 1977 the press got hold of the story. According to one article, John Schwartz told an NIH official that the University had set up another committee to investigate the

Martins charges, and that " 'as a result of their review, there were no wrong-doings.' " But the article also quoted Schwartz as saying that "no new official probe [had] been launched 'so far' " since the Feigen committee report of October 2, 1975. Another article quoted Schwartz as saying that "[I]n committee reports of 1974 and 1975 neither committee found any evidence of any deliberate scientific misrepresentation."

By this time Martins had filed a lawsuit against Dr. Lucas.[3] In the course of that lawsuit Dr. Lucas was obliged to answer interrogatories under oath. His answers suggested that in applying for government grants he had misstated his

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[3] The Martins lawsuit ultimately was settled out of court, upon terms not revealed in our record.

own bibliography (i.e., what articles he had published, and where); and so "a separate investigation of the accuracy of [Dr.] Lucas' bibliographical citations in grant applications was begun at the insistence of NIH." In July of 1977 John Wilson, M.D., an associate dean for faculty affairs, was instructed to head a committee to conduct the investigation. This investigation was not related to the substantive allegations of fraudulent data previously made by Dr. Dong.

In August of 1977, just as the Wilson committee was getting underway, Dr. Lucas resubmitted "his 'fraud' charges" against Dr. Dong to the latter's department head, Dr. Shumway. Dr. Shumway consulted with other members of his own department; and on September 1, 1977 he wrote to Dr. Lucas that "our Departmental committee feels that no true case has been raised

by your letter of February 11, 1976, and unless there is further evidence, we suggest the matter be dropped."

"During this same period in late 1977, Dr. Dong's office was moved, without consultation with him, from the site of the rest of the office comprising the administrative center of his department, to an isolated, small office that was formerly a storage closet for laboratory equipment."

On June 6, 1978 Dr. Lucas wrote to defendant Clayton Rich, M.D., the dean of the University's medical school, realleging his original charges of "fraud" against Dr. Dong. "[Dr.] Lucas' original July 24, 1975 articulation of his now twice-rejected 'consumer fraud', 'scientific fraud', and 'public fraud' charges was attached to the June 6 letter. The June 6 letter also contained

the outright lie that the Feigen committee members 'were not prepared to offer an evaluation of my counter-charges, but concluded that the counter-charges had merit and should be investigated (by another committee).' " Dr. Rich asked the Wilson committee to investigate the charges maintained by Dr. Lucas against Dr. Dong. Dr. Wilson asked the assistance of the University's legal staff.

"During early October, 1978, Dr. Dong found out informally through Dr. Shumway about this latest investigation of charges against him. He saw for the first time [Dr.] Lucas' original accusatory letter of July 24, 1975. He was so scared and confused about these 'undead' charges he went to see a lawyer." In November of 1978 Dr. Dong first saw a copy of the full Feigen committee report. "For the

first time Dr. Dong saw the conclusions reached some three years earlier vindicating his analysis and committment [sic ] to research ethics and condemning [Dr.] Lucas."

In January of 1979 defendant John Schwartz informed the NIH by letter that any previous communications, to the effect that the Feigen committee had found Dr. Lucas "not guilty" of any fraud, might have been due to a misunderstanding.

On March 5, 1979 the University suspended Dr. Lucas without pay for twelve weeks, "on grounds of professional misconduct in misstating the status of his publications in bibliographies submitted in applications and reports to the NIH." The NIH, when informed of the suspension, closed its investigation on May 24, 1979.

Dr. Dong filed the present lawsuit on June 5, 1979. "The final touches on the truthful picture were provided by the sworn testimony of forensic scientist and 'questioned documents' expert Kenneth D. Parker in December, 1980. Mr. Parker examined the Lucas laboratory notebooks that underlay some of the research findings that had been challenged by A. Baronio Martins and Dr. Dong. He [i.e., Parker] found the notebooks to have been altered to add fictitious data and to change data already entered. He called the research results 'science fiction.'[4] This was the simple truth Gene Dong had been after for years."

"Dr. Dong's salary is now below the twenty-fifth percentile for medical school faculty with his training and

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[4] This testimony allegedly was given in a deposition taken in the lawsuit filed against Dr. Lucas by A. Baronio Martins.

experience. His students have been promoted past him, while he has not been considered for promotion. He has had to take anti- ulcer medication to combat the symptoms of emotional distress. But he was right the whole time."

Thus endeth the opening statement.

III.

Dr. Dong's first amended complaint contained six causes of action. Summary judgment (which is not challenged here) disposed of cause three entirely, and of cause two as to all defendants save Dr. Lucas and the University. After summary judgment the status of the complaint was this:

Cause one is aimed at Dr. Lucas alone. In essence it alleges that Dr. Lucas sent a letter to the Feigen committee in July of 1975, accusing Dr. Dong of "consumer fraud," "public fraud," and "scientific

fraud"; that the letter was written with malice; that the statements in the letter were libelous on their face; and that as a proximate result of the letter's publication Dr. Dong "has suffered loss of his reputation, shame, fear and hurt feelings, all to his general damage...."

Cause two is leveled at Dr. Lucas and the University. It alleges that Dr. Lucas sent a letter to Dr. Rich in June of 1978, accusing Dr. Dong of "violating good scientific practice," "consumer fraud upon the public," "serious violations of scientific ethics," and "grossly exaggerated claims"; that the letter was written with malice; that the statements were libelous on their face; and that as a proximate result of that letter's publication Dr. Dong "has suffered loss of his reputation, shame, fear and hurt feelings," etc. It further

alleges that the University, as Dr. Lucas' employer, was responsible for his conduct.

All named defendants except Dr. Lucas are targets of cause four. It is there alleged that the defendants intentionally conspired together to inflict emotional distress on Dr. Dong, by (1) concealing the true evaluations of committees, (2) misrepresenting those evaluations to the public and to agencies of the federal government, (3) "repetitively ordering extraordinary proceedings aimed at plaintiff's academic, scientific and professional integrity on the basis of identical and discredited accusations," and (4) "concealing the scope, nature and seriousness of such charges from the plaintiff...."

Cause five in essence alleges that the defendants negligently performed the sins

alleged in cause four.

Cause six alleges that the University breached its implied covenant of good faith and fair dealing with Dr. Dong, by doing the acts alleged in causes one, two, and four, and "by impeding plaintiff's discharge of his academic and scientific duties." It is further alleged that as a proximate result of the breach Dr. Dong suffered "severe emotional distress" and "has been deprived of certain career advancements in the form of promotions and salary advances which would have been normal incidents of said employment agreement...."

IV.

On the first day of trial Dr. Lucas moved in limine to exclude from evidence his letters (1) to the Feigen committee, dated July 24, 1975, and (2) to defendant Dr. Clayton Rich, dated June 6, 1978.

Both letters were presented to the trial court, and the record before us plainly reveals that the court read them. The court granted the motion on the ground that both letters, taken as a whole, represented statements of opinion rather than statements of fact.

Initially Dr. Dong contends that all of the motions in limine were improper. For example, he points out that the question of whether Dr. Lucas' letters stated fact or opinion was raised by demurrer well in advance of trial, and the demurrer was overruled. He further argues that the motions in limine were actually motions for summary judgment in disguise, and were not made in compliance with Code of Civil Procedure section 437c. But an in limine motion for exclusion of evidence is addressed neither to allegations contained in a

pleading nor to causes of action or specific issues; instead, it is directed toward specific evidence. A motion in limine is "designed to prevent the prejudicial effect that may result when an objection to evidence is sustained, and the jury is then instructed to disregard the evidence. To avoid the necessity of 'unringing the bell,' the motion in limine allows a party to obtain an order excluding evidence 'in advance' on any ground which would be sufficient for an objection." (6 Witkin, Cal.Procedure (3d Ed.1985), Proceedings Without Trial, s 2, p. 328.)

Whether a given communication constitutes a statement of fact or of opinion is a question of law to be decided by the court. (Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254, 260, 228 Cal.Rptr. 206, 721 P.2d

87.) "In making such a determination, the court must place itself in the position of the hearer or reader, and determine the sense or meaning of the statement according to its natural and popular construction." (Ibid.) "California courts have developed a 'totality of the circumstances' test to determine whether an alleged defamatory statement is one of fact or of opinion. First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense.... Where the language of the statement is 'cautiously phrased in terms of apparency,' the statement is less likely to be reasonably understood as a statement of fact rather than opinion." (Id., at pp. 260-261, 228 Cal.Rptr. 206, 721 P.2d 87.) Next, the context in which the statement was made and the facts surrounding the publication

must also be considered. (Id., at p. 261, 228 Cal.Rptr. 206, 721 P.2d 87.) The questioned publication must be considered in its entirety; it cannot be divided into segments and each portion treated as a separate unit. (Ibid.)

However, "[e]ven if a statement appears in opinion form, if it implies factual assertions, some 'courts have held that it should not receive the benefit of First Amendment protection as an opinion.' [Citation.] ¶This principle is reflected in section 566 of the Restatement Second of Torts. It provides: 'A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.' " (Id., at p. 266, 228 Cal.Rptr. 206, 721

P.2d 87, fn. partially omitted.) "Thus, courts have found statements to be nonactionable opinion when the facts supporting the opinion are disclosed." (Id., at p. 266, fn. 7, 228 Cal.Rptr. 206, 721 P.2d 87, italics in original.)

Guided by these principles we turn to the letters themselves, copies of which we have examined.

A. The July 24, 1975 Letter

Dr. Lucas' letter to Professor George S. Feigen, dated July 24, 1975, is typewritten, single-spaced, and five pages long minus exhibits. It contains a considerable body of scientific data and description which we are unable to evaluate; but it is apparent that the letter is critical of certain research papers previously presented by Dr. Dong to various medical societies.

At the close of his opening paragraph

Dr. Lucas wrote, "I request that the Committee evaluate whether Dr. Dong himself has practiced many of the same things he has accused me of doing." At the close of his second paragraph he wrote, "I wish to suggest that [Dr.] Dong committed the same misdeed that he accused me, that of preparing an abstract before the completion of its experiments." Dr. Lucas next summarized certain data presented by Dr. Dong, criticized that data, and then said, "I suggest that the paper over-stepped the scientific data, that the authors were aware of this, and that this constitutes public fraud. (I am not a lawyer and I use the latter terminology only to make a case that parallels [Dr.] Dong's letter to the Feigen committee.)" (Emphasis in original.)

Dr. Lucas then critically examined two

other papers co-authored by Dr. Dong, and the data supporting the conclusions. He summarized thus: "¶I believe that the above show that in some of [Dr.] Dong's reported scientific works there are 1) inadequate explanations of procedures, 2) preparation of an abstract before completion of all the experiments, 3) deceptive reporting of data in a second publication on the same subject as new material, 4) public and scientific fraudulent reporting of the scientific significance of their observations, and 5) suppression of certain data not supporting their high expectations of the RLB assay. ¶I think that the parallelism between [Dr.] Dong's accusations of my work, and this analysis of his work with R. Morris, is remarkable. I think for the sake of fairness to me, and for the sake of the University's credibility in having

only a single standard of professional ethics, that Dr. Dong's behavior be examined by a University peer group."

Dr. Lucas enclosed eleven exhibits with the letter.

As noted, the letter is framed in terms of Dr. Lucas' "request" for an investigation, his "suggestions" that Dr. Dong engaged in misconduct, and his "belief" in what the disclosed facts revealed. The letter did not imply that there were undisclosed defamatory facts which prompted its writing. Instead the apparent aim of the letter was to set forth the precise information upon which Dr. Lucas' "belief" was based. Dr. Dong did not claim in his opening statement, nor does he claim here, that Dr. Lucas misrepresented the medical data which led him to his "belief." Where the facts supporting a statement are disclosed,

courts have found such statements to be nonactionable opinion. (Okun v. Superior Court (1981) 29 Cal.3d 442, 451-452, 175 Cal.Rptr. 157, 629 P.2d 1369; Carr v. Warden (1984) 159 Cal.App.3d 1166, 1170, 206 Cal.Rptr. 162.)

We conclude that the trial court correctly ruled that the July 24 letter, taken as a whole, was a statement of opinion and therefore not defamatory as a matter of law. "Although false charges that an individual has committed a crime or is personally dishonest are not protected by the First Amendment [citation], statements of opinion, no matter how outrageous or pernicious, are protected." (Carr v. Warden, supra, 159 Cal.App.3d at p. 1170, 206 Cal.Rptr. 162, italics in original.)

B. The June 6, 1978 Letter

Dr. Lucas' letter of June 6, 1978,

addressed to Dr. Clayton Rich (then dean of the University's school of medicine), is typewritten, single-spaced, and two pages long. The thrust of the letter appears at the close of the first paragraph: "I claim that, in regards to his [Dr. Dong's] scientific work as a Professor at Stanford University, his avid hunger for publicity can be interpreted as violating good scientific practice and constituting consumer fraud upon the public. I ask that you establish an extra-departmental peer committee to evaluate these charges."

Dr. Lucas went on to say that he previously had presented the same charges to the Feigen committee, and that "they were not prepared to offer an evaluation of my counter charges [i.e., against Dr. Dong], but concluded that the counter charges had merit and should be further

investigated (by another committee)." Dr. Lucas further said that with respect to two of Dr. Dong's works, "nationwide publicity was actively sought when there was precious little data to back [the] grossly exaggerated claims." His letter concludes thus:

"I consider that [Dr.] Dong's actions, then and now, are an embarrassment to [Dr.] Norman Shumway and that an internal review has yielded only a 'white wash' of [Dr.] Dong's lack of scientific propriety. On the basis of the evaluation by the Feigen Committee and [Dr.] Dong's continued quest for publicity, initially as a 'great scientist' and now as a crusader against the medical establishment, I request that you establish an extra-departmental committee to review these charges. I cannot imagine that such an investigation

would be any less in scope than the investigations into my own scientific conduct."[5]

This second letter was merely a reiteration of the first letter, with one exception. The phrases "I claim that" and "I consider that" are plainly expressions of opinion. In essence Dr. Lucas criticizes Dr. Dong for seeking publicity based upon (in Dr. Lucas' opinion) "precious little data" and "grossly exaggerated claims." The exception was Dr. Lucas' statement that the Feigen

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[5] The third paragraph of this letter sheds some light on the previous letter of July 24, 1975. That paragraph reads in part: "¶On February 11, 1976, I submitted the same information to Dr. Norman Shumway with the request that he investigate the charges. He ignored the letter. In August 1977, I resubmitted the same letter. Dr. Shumway set up an internal review committee of members of his own department and in a letter to me dated September 1, 1977 (letter enclosed), concluded that there was little substance to my allegations."

committee "concluded that [my] counter charges [against Dr. Dong] had merit and should be further investigated (by another committee)." In fact the Feigen committee wrote: "These [i.e., the charges made by Dr. Lucas] allege that Professor Dong was guilty of the same type of behavior that he attributed to Dr. Lucas. We did not examine these allegations but include them for the record." The false statement was not defamatory as to Dr. Dong. In defamation actions the First Amendment requires "that the statement on which the claim is based must specifically refer to, or be 'of and concerning,' the plaintiff in some way." (Blatty v. New York Times Co. (1986) 42 Cal.3d 1033, 1042, 232 Cal.Rptr. 542, 728 P.2d 1177.) While it is true that any living person may be defamed, "[t]he civil action is personal

to the plaintiff, and cannot be founded on the defamation of another; but it is of course possible that two persons may stand in such a relation that defamation of one will be found to reflect upon the reputation of the other--as where, for example, it is said that the plaintiff's mother was not married to his father; and where such is the case, the plaintiff may have an action in his own right." (Prosser and Keaton on Torts (5th ed., 1984), s 111, p. 778, fns. omitted.) Dr. Lucas' letter attributed a false conclusion to the committee, and perhaps thereby insulted it; but Dr. Dong was not a member of the committee, and took no part in writing the committee report.

Furthermore, we are required to construe the letter as a whole; it cannot be considered in separate segments. (Baker v. Los Angeles Herald Examiner,

supra, 42 Cal.3d at p. 261, 228 Cal.Rptr. 206, 721 P.2d 87.) Taken as a whole, we agree with the trial court that the June 6 letter was a statement of opinion rather than one of fact.

V.

The trial court also ruled in limine that "the lab books and the evidence regarding the research and scientific work by Dr. Lucas" would be excluded from evidence. "The Court finds it is not relevant and that in light of the Consitutional right of privacy it should be excluded and even if relevant under [section] 352 of the Evidence Code the danger of confusing the jury and taking up additional time on evidence that is so marginally relevant and has so little probative value is unwarranted."

The laboratory notebooks of Dr. Lucas were not before the trial court. Dr.

Dong's counsel made the following offer of proof: "We have claims in the case for intentional infliction of emotional distress and bad faith, breach of a covenant of good faith and fair dealing against Stanford. It is our assertion that we can prove through Mr. Parker, the forensic analyst that the lab notebooks are forged and that the research is fictitious. If that is proven it would be our position that that would demonstrate that actions taken by Stanford vis-a-vis [Dr.] Dong were either outrageous in the sense of our fifth [sic ] cause of action for intentional infliction of emotional distress or were bad faith in the context of our sixth cause of action for bad faith, breach of the covenant of good faith and fair dealing." Counsel further argued that "had Dr. Dong had an opportunity to get those [laboratory]

books and have them analyzed he would have been able to determine for himself that they were fictitious far earlier in the process and therefore a substantial amount of his own emotional distress would have been avoided."

Dr. Dong's counsel essentially renews these same arguments on appeal. We are not impressed. If we understand the arguments correctly, they boil down to this: The University's failure to provide Dr. Dong with copies of Dr. Lucas' laboratory notes constituted a breach of the University's implied covenant of good faith and fair dealing, and caused Dr. Dong to suffer emotional distress. This train of thought is almost exquisitely preposterous.

First, the offer of proof--to the effect that "the lab notebooks are forged"-- related to evidence developed

after this lawsuit was filed. Therefore it is inconceivable that his inability to inspect the laboratory notebooks contributed to Dr. Dong's alleged emotional distress; before he filed his own complaint he knew nothing of the alleged forgery. Second, with regard to the theory of intentional infliction of mental distress, our state Supreme Court has held that the allegedly outrageous conduct " 'must be so extreme as to exceed all bounds of that usually tolerated in a civilized community,' " and must be directed toward the plaintiff himself. (Davidson v. City of Westminster (1982) 32 Cal.3d 197, 209, 185 Cal.Rptr. 252, 649 P.2d 894.) "The plaintiff cannot recover merely because of hurt feelings." (Prosser and Keaton on Torts, supra, s 12, pp. 59-60, fn. omitted.) Third, concerning the theory of negligent

infliction of emotional distress, Dr. Dong was neither a "direct victim" (Molien v. Kaiser Foundation Hospitals (1980) 27 Cal.3d 916, 923, 167 Cal.Rptr. 831, 616 P.2d 813) nor a percipient witness (Ochoa v. Superior Court (1985) 39 Cal.3d 159, 172-173, 216 Cal.Rptr. 661, 703 P.2d 1). Fourth, we know of no case--and none has been cited to us--which holds that a university has a duty to investigate the research of one professor in the manner dictated by another professor. Fifth, we know of no case--again, none has been cited to us--in which a university was held liable for breach of an implied covenant of good faith and fair dealing when it failed to disclose to one professor defects in the research of another professor. The dearth of authority points to the absurdity of both notions.

But, argues Dr. Dong, the University itself has a policy prohibiting secret research, and the University violated that policy. The policy reads in part: "Resolved: ¶1. That the principle of openness in research--the principle of freedom of access by all interested persons to the underlying data, to the processes, and to the final results of research--is one of overriding importance. Accordingly it is the decision of the Senate that that principle be implemented to the fullest extent practicable...." This policy was plainly implemented for the benefit of the University. A subsequent paragraph of the policy reads: "¶c. Scholarly activities not accessible for scrutiny by the entire Advisory Board should not be considered in connection with appointments, reappointments or

promotions." The next paragraph reads in part: "¶d. The University should enter no contract and accept no grant to carry out research if the grant or contract restrains the freedom of the University to disclose (1) the existence of the contract or grant or (2) the general nature of the inquiry to be conducted or (3) the identity of the outside contracting or granting entity or (4) the research results...." (Emphasis supplied.) The policy goes on to carve exceptions for certain kinds of secret research. We do not read the policy to grant unlimited access by one professor to the research notes of another.

Dr. Lucas' laboratory notebooks were not relevant evidence simply because they had no "tendency in reason to prove or disprove any disputed fact that [was] of consequence to the determination of the

action." (Evid.Code, s 210.)

VI.

The trial court further ruled in limine that "[t]he motion to exclude the Feigen report and any other evidence concerning the hearings on the Lucas--the investigation into Dr. Lucas' work is granted." The precise reason for the ruling is not set forth in the record.

A copy of the Feigen committee report was attached to Dr. Dong's trial brief and was therefore before the trial court. Counsel for Dr. Dong argued that the University, in withholding the contents of the report and in misstating the committee's conclusions to the press, caused Dr. Dong "doubt and concern over his credibility as a scientist which caused him distress, which caused him distraction from his job performance which we will show resulted in less pay

and no access to promotion. It is relevant on those topics." On appeal Dr. Dong renews these arguments and adds others. He now contends (1) that the principle of academic freedom allowed him access to the Feigen committee report, for the purpose of advancing his own professional career by establishing "the existence of fraud in publicly-funded research"; and (2) that the University "restrained and chilled appellant's Academic Freedom right by erecting standardless administrative barriers, which were substantively irrational and applied to him in an arbitrary and discriminatory fashion."

These arguments presuppose that the University may be held liable in damages to a professor for refusing to divulge the contents of a disciplinary report concerning a fellow faculty member. We

question the premise.

As we pointed out in Kahn v. Superior Court (1987) 188 Cal.App.3d 752, 759, 188 Cal.Rptr. 752, 233 Cal.Rptr. 662, the exact contours of academic freedom have not been fully delineated. In a concurring opinion in Sweezy v. New Hampshire (1957) 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311, Justice Felix Frankfurter said this: " '¶It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " (Id., at p. 263, 77 S.Ct. at p. 1218, italics added.) The quoted passage has found

approval in subsequent opinions of the United States Supreme Court. (See, e.g., Regents of University of Michigan v. Ewing (1985) 474 U.S. 214, 106 S.Ct. 507, 514 fn. 12, 88 L.Ed.2d 523 (Stevens, J., writing for the court; University of California Regents v. Bakke (1978) 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (lead opinion by Powell, J.).) That court has also suggested, albeit in contexts different from this case, that academic freedom is "a special concern of the First Amendment." (Regents of University of Michigan v. Ewing, supra, 474 U.S. at p. ----, 106 S.Ct. at p. 514; University of California Regents v. Bakke, supra, 438 U.S. at p. 312, 98 S.Ct. at p. 2759; Keyishian v. Board of Regents (1967) 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629.) But the high court has not yet addressed the

extent of a university's autonomy in deciding "who may teach."

We are unwilling to allow that autonomy to be circumscribed by the views of a single professor, no matter how righteous he may be.

In Franklin v. Leland Stanford Junior University (1985) 172 Cal.App.3d 322, 218 Cal.Rptr. 228 a tenured professor, who disapproved of certain research then performed at the University, incited students forcibly to shut down the research facility. The University dismissed him. He challenged the dismissal in the trial court, and lost. This court affirmed the judgment. Among other things we held: "¶It is clear that the constitutional freedom to speak does not license a teacher to substantially disrupt and interfere with the normal operations of his or her employer,

whether they be instruction, research, or administration." (Id., at p. 341, 218 Cal.Rptr. 228.) [11][12] In the same vein, the right to speak freely does not compel an audience to attend or to listen. The opportunity for critical inquiry and analysis, vigorous advocacy, and dialogue, all in the pursuit of truth, provides no guarantee that the truth (if it is that) will be discerned and accepted. Galileo's inquisitors, for example, refused to accept the fact that the earth circles the sun. Here the University may have had a duty to the federal government to investigate the possibility of fraudulent research accomplished at the expense of federal funds. It may have had an obligation to the public at large, and to itself, to maintain high ethical standards of research in its medical school. But it

had no corresponding duty to Dr. Dong as an individual; the implied covenant of good faith and fair dealing does not compel an employer to accept the views of an employee, even if those views are correct.

Furthermore, it appears that by its own regulations the University owed to Dr. Lucas the right to notice and an opportunity to be heard. The University's Faculty Handbook contains a "Statement on Faculty Discipline," which provides in pertinent part that in disciplinary proceedings "that member shall first be notified, in confidence, of the charges against him and shall be given the opportunity of replying to them." A faculty member wishing to contest the charges may request a full hearing in private, and is entitled to be represented by counsel and to appear in

person. These provisions are totally antithetic to the notion that an investigation must reach a certain outcome.

We cannot perceive that Dr. Dong's own academic freedom was otherwise curtailed. From all that appears in the record, Dr. Dong was at all times allowed to teach, to argue, to complain, and to pursue his own research; and he apparently is still employed at the University's medical school.

We cannot and do not express any opinion as to whether Dr. Lucas in fact did false research; that question is plainly beyond our ken. But even if we assume, for the sake of argument--an assumption purely hypothetical--that Dr. Dong was entirely correct in his assertions, we nevertheless conclude that he has no cause of action against the

University on that ground. In the words of Fyodor Dostoyevski, "Men reject their prophets and slay them, but they love their martyrs and honour those whom they have slain." [6] They do not, however, award them damages; publicity brings its own reward.

Therefore the Feigen committee report was not relevant, and was properly excluded from evidence.

VII.

The trial court also excluded from evidence documents reflecting correspondence between the University and NIH officials. The court said this: "As far as I'm concerned they are privileged and I believe that's already been found by the Court and I would be making the same ruling in essence that this Court

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[6] The Brothers Karamazov, Book VI, Chapter 3.

has already made,[7] the communications with the National Institute of Health were all privileged." In the trial court Dr. Dong's counsel made the following "offer of proof": "¶We would offer that in an evidentiary sense they are relevant once again to show the quality of the conduct of Stanford, vis-a-vis Plaintiff, and that is specifically that communication to the NIH [,] Stanford misled the NIH consistent with the way they misled the public and the Plaintiff through the press about what had been found with respect to the analysis Plaintiff had done about Dr. Lucas. We would urge that this is probative of

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[7] In considering a motion for summary judgment made by the defendants, another superior court judge ruled that communications between the University and the NIH were absolutely privileged under Civil Code section 47, paragraph 2, as "having been uttered in an official proceeding authorized by law."

Stanford's outrageous conduct, vis-a-vis the Plaintiff. We would urge it is probative vis-a-vis Stanford's bad faith conduct vis-a-vis the Plaintiff in the employment context." Counsel also pointed to the distinction between a privileged communication and an evidentiary privilege: "¶There's a difference, a critical distinction between making the communication an act upon which you seek to impose liability for damages and using communications as background or relevant evidence of the motive by which other acts were taken."

On appeal Dr. Dong reiterates the latter argument. He claims the trial court "confused Civil Code s 47(2) 'privilege' with Evidence Code 'privilege'." We are not persuaded.

We are fully aware that the distinction exists. In Oren Royal Oaks

Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157, 232 Cal.Rptr. 567, 728 P.2d 1202 the plaintiff developer sought to impose liability upon the defendants for abuse of legal process in bringing a previous CEQA action. The developer contended that the action had not been brought to protect environmental concerns, but rather to obtain a money settlement; and to establish its point it sought to rely upon certain statements made during settlement negotiations in CEQA proceedings. The defendants argued that the statements were absolutely privileged under Civil Code section 47, paragraph 2. The trial court agreed, and granted summary judgment for the defendants. Our state Supreme Court disagreed, and held this: "Indeed, on brief reflection, it is quite clear that [Civil Code] section

47(2) has never been thought to bar the evidentiary use of every 'statement or publication' made in the course of a judicial proceeding: answers to interrogatories or to questions at depositions are, for example, routinely admitted into evidence and relied on in determining liability even though they are clearly 'statements made in the course of a judicial proceeding.' Thus, while section 47(2) bars certain tort causes of action which are predicated on a judicial statement or publication itself, the section does not create an evidentiary privilege for such statements. Accordingly, when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining

whether the individual acted with the requisite intent." (Id., at p. 1168, 232 Cal.Rptr. 567, 728 P.2d 1202, italics in original and supplied.)

On the other hand, in Ribas v. Clark (1985) 38 Cal.3d 355, 212 Cal.Rptr. 143, 696 P.2d 637 the plaintiff sued his former wife for (among other things) intentional infliction of emotional distress and invasion of privacy. Liability was alleged to be based upon certain statements made by the ex-wife at a previous arbitration hearing. The ex-wife claimed that her statements were privileged under Civil Code section 47, paragraph 2. The trial court agreed and sustained a demurrer without leave to amend. On appeal our state Supreme Court held: "[A]lthough the statutory privilege accorded to statements made in judicial proceedings appears in the code in the

chapter on defamation, it applies to virtually all other causes of action, with the exception of an action for malicious prosecution. [Citation.] Thus, the privilege will defeat claims of invasion of privacy [citations] and intentional infliction of emotional distress. [Citation.]" (Id., at p. 364, 212 Cal.Rptr. 143, 696 P.2d 637, cited with approval in Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra, 42 Cal.3d at p. 1164, fn. 5, 232 Cal.Rptr. 567, 728 P.2d 1202.) The essential reasoning is this: "The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint. If it is desirable to create an absolute privilege in defamation, not because we desire to protect the shady practitioner, but because we do not want the honest one to

have to be concerned with libel or slander actions while acting for his client, we should not remove one concern and saddle him with another for doing precisely the same thing." (Thornton v. Rhoden (1966) 245 Cal.App.2d 80, 99, 53 Cal.Rptr. 706, cited and quoted with approval in Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra, 42 Cal.3d at p. 1165, 232 Cal.Rptr. 567, 728 P.2d 1202.)

In this case the NIH documents plainly contained evidence of statements made by University officials in the course of a federal investigation, i.e., "in any other official proceeding authorized by law." (Civ.Code, s 47, p 2.) No one here contends otherwise. Dr. Dong's claims against the University and its officials were predicated upon the statements themselves. For example, in his fourth

cause of action for intentional infliction of emotional distress, Dr. Dong accused the defendants of "engaging in a continuous course of outrageous conduct designed to injure and discredit the plaintiff," and to "undermine plaintiff's reputation," by (among other things) "misrepresenting [committee] evaluations, plaintiff's role in same, and plaintiff's attitude concerning the preservation of the integrity of the Stanford academic community to the courts, the public, agencies of the federal government, and plaintiff...." (Emphasis added.) The sixth cause of action realleged and incorporated the fourth cause by reference, and went on to say that "[i]n doing the acts and entering into the conspiracies hereinabove alleged, the defendant Stanford has continuously breached said

implied covenant of good faith and fair dealing and acted in bad faith and unfairly, by impeding plaintiff's discharge of his academic and scientific duties." (Emphasis added.) Therefore the NIH documents had far more than mere "evidentiary" value; they were the nuclei of two separate causes of action. Had those causes of action alleged only defamation, the documents would have been privileged under Civil Code section 47, paragraph 2. Simply because the labels affixed to the causes fell outside the defamation arena does not in this case make the documents any less privileged under the same code section. (Ribas v. Clark, supra, 38 Cal.3d at p. 364, 212 Cal.Rptr. 143, 696 P.2d 637; and see the cases collected in Block v. Sacramento Clinical Labs, Inc. (1982) 131 Cal.App.3d 386, 390-391, 182 Cal.Rptr. 438.)

Accordingly we hold that the trial court was correct, and that the communications between the University and the NIH were properly excluded from evidence.

VIII.

Finally, the trial court excluded "evidence sought to be submitted by Plaintiff concerning Stanford's conduct of the investigation of [Dr.] Dong...." On appeal Dr. Dong argues: "¶The content of the investigations of appellant--what was considered, when and why--is obviously relevant, if there is to be an assessment of the true motive and intent behind them, rather than uncritical post hoc rationalizations for them. Evidence of these investigations is clearly admissible to show the nature and extent of the chilling behavior, and the presence or absence of any permissible

reason for undertaking these adverse employment actions, contemporaneously with appellant's attempted exercise of his contractually protected right of academic inquiry."

The First District of the Court of Appeal, addressing this same case, has examined this issue before. "¶It may well be emphasized at this point that unlike the investigation of Dr. Lucas, the investigation of Dr. Dong resulted in neither charges of misconduct, nor disciplinary proceedings, nor punishment." (Board of Trustees v. Superior Court (Dong) (1981) 119 Cal.App.3d 516, 527, 174 Cal.Rptr. 160.) "It appears that such communications of the University's faculty members as were considered by the committees with respect to Dr. Dong were tendered under a guaranty of confidentiality. They were

thus manifestly within the [California] Constitution's protected area of privacy." (Ibid.) "¶Moreover, we are advised of no area of our law, or argument in reason, providing that an investigatory body finding no misconduct, must nevertheless allow discovery to the investigation's subject, of the evidence considered and its detailed conclusions thereon. Indeed, sound public policy appears to be otherwise." (Id., at p. 528, 174 Cal.Rptr. 160.)

We acknowledge that the First District was concerned with a discovery problem, and was writing in that context. But we think the reasoning of its opinion is sound, and by analogy appropriate here. We know of no authority, or argument in reason, which holds that an investigating committee is liable to the subject of its investigation for taking no action

against him. We cannot discern any breach of the implied covenant of good faith and fair dealing in a committee's decision to leave the plaintiff alone. Therefore this evidence also was properly excluded. The judgment is affirmed. Opinion of BRAUER, J., AGLIANO, P.J., and CAPACCIOLI, J., concur.

Excerpt from Appellant's Opening Brief

Court of Appeal - Academic Freedom

The express and quintessential benefit of his contract of employment, and the prerequisite for meaningful exercise of the other benefits mentioned above, is his right of Academic Freedom. Indeed, as stated by the Stanford Advisory Board, preservation of that right is the basis for the system of tenure at Stanford University:

> "As tenured members of the Stanford faculty, and as elected representatives of the faculty as a whole, we appreciate the critical role of tenure in protecting Academic Freedom.[1]

Two statements, published in the Faculty Handbook and thereby incorporated into appellant's contract of employment[2], give further definition to his right to freely pursue his chosen area of inquiry.

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[1] In the Matter of H. Bruce Franklin, Decision of the 1980 Advisory Board, [Appellant's Request for Judicial Notice ("RJN"), Exhibit 1, p.26].

[2] Rulon-Miller v. IBM, *supra*.

Academic Freedom: "Stanford University's central functions of teaching, learning, research and scholarship depend upon an atmosphere in which freedom of inquiry, thought, expression, publication and peaceable assembly are given the fullest protection. Expression of the widest range of viewpoints should be encouraged, free from institutional orthodoxy and from internal and external coercion." [App 193][Emphasis Added].

Secrecy in Research: "Resolve: 1. That the principle of openness in research--the principle of freedom of access by all interested persons to the underlying data, to the processes, and to the final result of research--is one of overriding importance. Accordingly it is the decision of the Senate that the principle be implemented to the fullest extent practicable, and that no program of research that requires secrecy (as hereinafter defined) be conducted at Stanford University, subject to the exceptions set forth in ¶4 of this Resolution." [App 145][Emphasis added].

Appellant was also more than an just an employee. He was also a research scholar and a licensed physician in a

publicly funded medical institution. This tripartite status meant that he enjoyed a professional career with important remunerative elements both inside and outside[3] of Stanford University. These elements were interdependent, and dependent on his professional reputation. Thus, Stanford had significant power to adversely affect his reputation, and thereby, his professional earning capacity. Stanford had not only a contractual duty to deal with appellant, in the course of his professional inquiry into Lucas' work, in good faith and even-handedly, Rulon-Miller v. IBM, *supra*; but also a common law duty not to prevent him from fully practicing his profession by resort to rules or policies which were "substantively irrational or otherwise

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[3] For example, medical consulting, outside medical practice, speaking honoraria, and academic authorship.

unreasonably susceptible of arbitrary or discriminatory application", Miller v. Eisenhower Medical Center, 27 Cal. 3d 614 (1980), Pinsker v. Pacific Coast Society of Orthodontists, 1 Cal. 3d 160 (1969); or "contrary to public policy", Pinsker v. Pacific Coast Society of Orthodontists, 12 Cal. 3d. 541 (1974).

By engaging in the conduct complained of in the Fourth, Fifth and Sixth Causes of Action, Stanford restrained and chilled appellant's Academic Freedom right by erecting standardless administrative barriers, which were substantively irrational and applied to him in an arbitrary and discriminatory fashion.[4] These violations of appellant's established contractual and common law rights were committed in bad faith and intentional and reckless disregard of

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[4] See, Section IIB(1), *infra*.

his protected interest in peace of mind. They were the subject of causes of action which had withstood two voluminous summary judgment attacks. Under the above authorities, appellant was entitled to trial on the merits of his substantial claims for economic and emotional distress damages against Stanford.

**(2) The Scope of Appellant's Contractual Right of Academic Freedom Is Defined by the United States Constitution and the California Constitution.**

Academic Freedom is a constellation of freedoms, consisting of the freedoms to teach, to think, to inquire, to dispute on the basis of facts, and to publish. In short, it is the freedom to pursue truth wherever the path leads. Sweezy v. State of New Hampshire, 354 U. S. 234, 250 (1957). Keyishian v. Board of Regents, 385 U.S. 589, 683 (1967), firmly

established the constitutional basis of Academic Freedom[5]:

> "Our Nation is deeply committed to safeguarding **academic freedom**, which is of transcendent value to all of us and not merely to the teachers concerned. **That freedom is therefore a special concern of the First**

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[5] Stanford has elected to adopt the First Amendment of the United States Constitution as the source of the "fullest protection" afforded its faculty under its contractual policy of Academic Freedom, quoted above. During the Trial Court Proceedings in Franklin v. Stanford, Stanford stated that: "The First Amendment applies to academic communities in light of the 'special characteristics of the school environment'". [RJN 57:20-58:1], and that "Academic Freedom means freedom to teach, learn, and pursue the truth wherever the path leads, uncoerced." [RJN 65:23-24]. In the appeal in that case before this Court, Stanford expressly bound itself to First Amendment standards as a restriction on its power to terminate Franklin's employment contract. Franklin v. Stanford, 172 Cal. App. 3d 322 (1985), at p. 328, Fn. 3. Stanford previously asserted the Academic Freedom rights of its faculty in court as a legal basis for highly advantageous tax benefits. Board of Trustees v. County of Santa Clara, 86 Cal. App. 3d 79 (1978).

> Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, 364 U.S., at 487, 81 S.Ct., at 251. The classroom is peculiarly the 'marketplace of ideas.' " 385 U.S. at page 603.[Emphasis added][6]

First Amendment Academic Freedom clearly applies to research scholars such as appellant. Dow Chemical Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982). Appellant's contractual right to access Lucas' research data, in accordance with Stanford's above quoted "openness" policy, is also an established part of First Amendment law, Wright v. Jeep, 547 F. Supp. 871 (E.D. Mich. S.D. 1982):

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[6] Cited and followed by White v. Davis, 13 Cal.3d. 757,767 (1975), establishing Academic Freedom independently under the California Constitution.

"The value of the conclusions turns on the quality of the data and the methods used by the researcher in his analysis of that data as well as the skill and perception of the researcher. So if the conclusions or end product of a research effort is to be fairly tested, the underlying data must be available to others equally skilled and perceptive. *** [¶]The protection of the First Amendment is designed to afford the right to write and to speak. It does not give a right to withdraw material written and published from public scrutiny, nor does it give a right to refuse to disclose facts discovered as a result of observations that are relevant in making a judgment as to the correctness of the researcher's published conclusions." 547 F.Supp. at pp. 874-75.

Because the subject matter of appellant's inquiry was directly a matter of public concern, i.e. the existence of fraud in publicly-funded research, appellant additionally enjoyed the broader "fundamental personal right" of Freedom of the Press. Near v. Minnesota, 283 U.S. 697,717 (1933). Branzburg v. Hayes 408 U.S. 665,705-06 (1972). Lovell

v. City of Griffin, Ga., 303 U.S. 444,452 (1938). This "expressly guaranteed" First Amendment freedom shares "a common core purpose of assuring freedom of communication on matters relating to the functioning of government." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). There is a strong public policy interest in appellant's functioning as a conduit to the public of information concerning the accuracy of published medical research.[7]

Under the terms of his contract, appellant enjoyed the above described

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[7] See, First National Bank of Boston v Bellotti 435 U.S. 765 at pp. 782-83 (1978). Red Lion Broadcasting Co v. Federal Communication Commission, 395 U.S. 367 at p. 390 (1969). Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). These decisions stand for the proposition that the First Amendment protects the right of the public to receive information necessary for informed decision-making.

constellation of rights and duties, and was entitled to pursue his inquiry to its ultimate conclusion, free from interference, inhibition, coercion or retribution by Stanford. After all, that was his job:

> "The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work consists of his thought and speech."[8]

**B. The Evidence Excluded By The Trial Court Is Relevant To Stanford's Irrational and Arbitrary Restraint Of Appellant's Contractual Right To Academic Freedom, In Violation of The Covenant of Good Faith and Fair Dealing**

(1) Stanford's Restraint of Appellant's Inquiry Was Wrongful.

The standard for the functioning of a University was described by Justice

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[8] Machlup, F., "On Some Misconceptions Concerning Academic Freedom", 41 Am. Asso. Univ. Prof. Bull. 753, 756 (1956).

Brauer, concurring in Franklin v. Stanford, *supra*:

> "A university is a marketplace of ideas or it is nothing. It is a home for sober reflection, for critical inquiry and analysis, for vigorous advocacy, for dialogue, all in pursuit of the truth. The imposition of one's cause of point of view by coercion upon those of different persuasion is totally inconsistent with a university's process and function." 172 Cal. App. 3d at page 349-50.

Consistent with that concept, from 1973 to the present, appellant has been engaged in a continuing course of "critical inquiry and analysis", attempted "dialogue" with peers, and "vigorous advocacy", "all in pursuit of the truth" concerning Lucas' published work. Stanford, however, has responded by consistently restraining Appellant's inquiry and publications.[9]

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[9] Stanford's limiting of appellant's access to participate in the intellectual give and take of campus debate "is subject to that level of scrutiny

Allowing administrators unbridled power to regulate or control the exercise of First Amendment rights, without reasonable standards, is forbidden. Shuttlesworth v. City of Birmingham, 394

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commensurate with any level of prior restraint". Widmar v. Vincent, 454 U.S. 263, 268 Footnote 5 (1981): (1) June, 1973: Appellant analyzed Lucas and Morris' publications; and submits his analysis to his department chairman for further scientific review by an *ad hoc* committee of medical school colleagues [Raffel Committee], with access to Lucas' underlying data; appellant defers further inquiry while awaiting results of review. [App 668-74] (2) January, 1975: Appellant inquires of department chairman about the analysis and findings of this review committee; Chairman refuses to allow this inquiry. Appellant requests access to Lucas' underlying data; chairman refuses this request [App 687] (3) April, 1975: A second *ad hoc* committee of scientists is convened [Feigen Committee] to review allegations submitted by Dr. A. Baronio Martins re: Lucas' publications; Committee asks appellant to participate, and appellant submits his own further analysis to committee at its request [App 710] (4) October 1975: Committee reviews Appellant's analysis and issues its report [App 906] (5) February, 1976: Appellant denied access to committee's analysis, findings or report, and Lucas' responses thereto [App 770].

U.S. 147, 150 (1969). In the case at bar, no human subjects were involved in the those publications, and appellant was the only conceivable "confidential source" of information for either *ad hoc* scientific review committee analyzing Lucas' publications. Yet, Stanford used "confidentiality" as an unlimited barrier to bar appellant's access, without any objective standards for reconciling any legitimate interests in privacy with appellant's Academic Freedom rights.[10]

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[10] "Privacy" has not been recognized by the United States Supreme Court as a substantial constitutional basis for inhibiting First Amendment rights in matters of public concern. The Court has reserved judgment only on the issue of whether or not publication of truthful "intimate" facts which outrage community "notions of decency" may be punished under State privacy laws. Time v. Hill 385 U.S. 374,383 (1967), Footnote 7. Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971). Cox Broadcasting Corp. v. Cohn, 95 U.S. 469,488 (1975). See also, Commonwealth v. Wiseman, 356 Mass. 251, *cert. denied*, 398 U.S. 960 (1970). Press-Enterprise

Stanford's selective use of a "confidentiality" policy, which first appeared in written form in a declaration in this case [App 174], to override appellant's contractual rights to Academic Freedom and "openness in research", is conduct which is substantively irrational, arbitrary[11] and against public policy.

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Co. v. Superior Court, 464 U.S. 501 (1984). Actions for invasion of Privacy may not be maintained when the expression is of a kind that is of **"legitimate concern to the public"**. Connick v. Myers 461 U.S. 138 (1982). Appellant's inquiry into Lucas' scientific publications meets every criterion of legitimate public concern expressed in Connick: 1) an intent to inform the public, 2) academic research, and/or 3) concerning criminal or civil wrong doing. There is no principled basis for the erection of barriers of personal privacy to bar this inquiry. See also, Diaz v. Oakland Tribune, 139 Cal.App.3d 118, 128 (1983).

[11] Stanford breached its expressed policy of confidentiality to appellant, when it disclosed to Lucas that appellant was Lucas' accuser. This disclosure proximately caused Lucas' two defamatory letters, and the investigations of appellant based on those letters [App 676,877,907].

Miller v. Eisenhower Medical Center, *supra*. Tameny v. ARCO, *supra*.

Furthermore, established case law holds that investigations of professors chill their exercise of First Amendment Rights of Academic Freedom. Sweezy v. New Hampshire, *supra*.[12] Here, appellant was subjected to three successive investigations of the same set of Lucas allegations. They were rejected each time. With respect to the last investigation by the Wilson Committee, appellant was not even advised of the nature and scope of the allegations being investigated or the possible sanctions. Nor was he allowed to participate in the investigation in any way, such as by offering material in his own defense. The chilling effect of this investigation on appellant's inquiry is

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[12] See, also, Keyishian v. Board of Regents, *supra* [loyalty oath imposed on college professor].

self-evident. Such chilling of his exercise of First Amendment rights is forbidden:

> "For '(t)he threat of sanctions may deter * * * almost as potently as the actual application of sanctions.' N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct., at 338. **The danger of that chilling effect upon the exercise of vital First amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.** [cites omitted]". Keyishian v. Board of Regents, *supra*, 385 U.S. at 603 [Emphasis Added].

(2) The Excluded Evidence Was Undeniably Relevant.

Stanford successfully obtained exclusion of relevant evidence, which appellant possessed and was prepared to introduce: (1) The Feigen Report and evidence of Stanford misrepresentations about the validity of Lucas' publications; (2) Lucas' laboratory notebooks and expert evidence relating to deliber-

ate falsifications of data therein; and (3) Evidence of Stanford's investigations of appellant. This evidence establishes Stanford's violation of appellant's contractual and common law professional rights, through intentional bad faith acts specifically designed to frustrate, obstruct and deter his pursuit of the truth, in order to protect Lucas' and Stanford's reputation and the continuing flow of public research funds.

The **Feigen Report** is *res gestae*[13] of the contractual Academic Freedom claim. It was consistently withheld from appellant by Stanford, notwithstanding the fact that its subject matter was **appellant's own analysis** of the Lucas publications, directly solicited by the

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[13] Just as the contract is the *res gestae* of a breach of contract action, or the actual spoken words are the *res gestae* of a fraud action.

committee's chairman.[14] The asserted ground for withholding the findings and conclusions of the Feigen Committee from appellant was "confidentiality";[15] yet one must ask the question, confiden-

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[14] The Report identifies appellant as the discoverer of the errors and inconsistencies: "With respect to the major charges, there seems to be little question that many significant inconsistencies and errors do exist in much of the submitted and published work of Professor Lucas. These errors and inconsistencies were **discovered by Professor Dong**, reviewed by us and in large part agreed to by Professor Lucas." [App 1635][Emphasis provided].

[15] The "legislative history" of the California Constitutional Right to Privacy lends no support to a notion that the People of the State intended that the right of privacy would be construed in such a manner as to inhibit the free discussion of matters of public concern in science, academia or government. The election brochure states that the People were concerned about the accumulation of records of individuals by corporations and government. White v. Davis, *supra*, at p. 775. To use that provision as a basis to quash dissemination of information to the public, concerning fraudulent government-funded research at a major university, is to stand the law on its head.

tiality of what as to whom? Lucas, the subject of the review, was fully apprised at all stages of all aspects of the committee's work, including the disclosure of the identity of appellant, his detailed analysis and the committees' findings and conclusions. If the committee members were concerned about their own anonymity, it surely could not have been as against appellant, because they invited him to participate in the review and relied on him heavily as their resource.

The Feigen report itself, within its four corners, demonstrates the appropriateness of appellant's Academic Freedom inquiry, and of his entitlement to access to this document in order to materially advance that inquiry, and thereby, his own professional career. Surely, the report of the committee, had

it not been withheld, would have provided significant direction and validation for appellant's continuing search for the truth:

> "The present committee ... was constituted to determine whether there was any merit to the allegations of scientific impropriety brought against Dr. Lucas principally by **Professor Eugene Dong.** [¶]... Since **Professor Dong** was the principal architect of the allegations against Dr. Lucas the committee suggested that he document his charges in detail. We chose to limit ourselves exclusively to points raised by **Professor Dong.** A document, including the background evidence, was prepared by **Professor Dong** and submitted to the committee. It is found as Exhibit 1 in this submission. [¶]After going over the material with **Dr. Dong** and after extensive private deliberation the committee agreed that the points raised were serious and that Dr. Lucas should be asked to give his interpretation of the evidence. [...] [¶]**A detailed analysis of both the oral and written arguments convinced the committee that Dr. Lucas' work contained numerous errors, contradictions, and alterations and therefore that it did not meet the standards considered appropriate to scientific work or to the education of students under his purview.**

> [¶]The detailed analysis and opinion, unanimously concurred in by the committee, was drafted by Dr. Mishell. It expresses our unanimous opinion that there exist sufficient grounds for the continuation of the inquiry by an appropriate agency of the University. [¶]In addition to the objective evidence of impropriety which can be constructed from the documents the committee formed the distinct impression that Dr. Lucas' laboratory was incompetently run, the personnel undisciplined, and the note-taking and record keeping either non-existent, or chaotic to such a degree as to make it impossible to verify certain crucial points in connection with the work alleged to have been done by Dr. Enomoto or others. [¶]**The committee believes that as much of the impropriety resulted from scientific and administrative incompetence as from deliberate attempts to fabricate. The former does not make the latter any less serious and for this reason we recommend further review be carried out.**" [App 1633] [Emphasis Added].

Furthermore, the Feigen Report is the benchmark against which all subsequent conduct of the Stanford defendants must be judged. The committee advised Stanford:

> "We conclude that while the case for fraud has not been established beyond a reasonable doubt, we maintain deep concern that some of the work may in fact have been fraudulent. We therefore recommend to you that a formal hearing to determine these questions of motive should be concerned [*sic*]." [App 1636].

The Feigen Report is highly probative evidence of Stanford's substantively irrational, arbitrary and bad faith treatment of appellant. Stanford's own committee recommended a "formal hearing" to investigate Lucas, seriously impugning his competence, integrity and credibility. Instead, Stanford chose to cover-up the Report and to carry out an investigation of appellant on the basis of Lucas' charges.

The **Laboratory Notebooks** are also *res gestae* of appellant's Academic Freedom claim. They are the things that appellant sought in pursuit of his inquiry, which were necessary to allow him to

"dispute" on the basis of facts. Stanford withheld them from him in violation of his contractual and professional rights. Their existence and their detailed content establish them as a resource, which appellant should have been free to use in order to further his inquiry on behalf of himself and the scientific community at large. Had they been available, his inquiry would have been significantly advanced in a timely fashion. Appellant would have been able to confirm his analysis, and use the information in any appropriate way for his own scientific and professional purposes.

The expert evidence of the spoliation of Lucas' data demonstrates that appellant's academic inquiry was not only within an appropriate area, but directly on point; not only in his own interest as

a researcher and scholar working in the area of transplantation, but also in the compelling interest of the public, i.e., an attempt to expose published fraudulent scientific data, which is still circulating uncorrected.

As importantly, the expert evidence of fabrication demonstrates that at any point prior to 1979, when Mr. Parker concluded from his forensic analysis that Lucas' original notebooks were "science fiction" [App 1153], both Stanford and appellant could have obtained a similar forensic analysis. Had appellant been able to do so, he would have been spared a substantial degree of emotional distress, arising from his continuing uncertainty and fear about the validity of his own scientific judgment in the analysis of Lucas' publications. Moreover, the fact that Stanford not only

did not obtain such a forensic review, but, even more strikingly, never, in either committee review, subjected the laboratory notebooks to a scientific review[16] is demonstrably relevant to show that Stanford's concern with the integrity of Lucas' publications was token; that its "investigations" were culpably incomplete; and that its motive in withholding material from appellant and subjecting him to successive investigations, was one of bad faith deterrence and obstruction.

Against this background, the last item of evidence excluded, that of Stanford's investigations of appellant, is direct evidence of chilling behavior by Stanford. Keyishian, *supra*. The fact that

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[16] As appellant did when he finally obtained access to them in 1980, after the filing of this suit, as an expert in Martins v. Lucas [RT 29:12-17].

appellant's tenured status made his dismissal a very problematic proposition, makes these adverse employment actions, taken against him by Stanford, extremely suspect, and requires that they be scrutinized for unconstitutional motivation. Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982). In Peacock, summary judgment on a medical school professor's First Amendment claim against his employer was reversed, and the case remanded for full evidentiary trial on the issue of motivation for his dismissal:

> "As a result, Peacock's First Amendment causes of action necessarily involve complicated questions of motive and intent. A fair resolution of these difficult issues requires a full trial on the merits. Indeed, we have recently reiterated that **'the decision as to an employer's true motivation plainly is one reserved to the trier of fact.'** [citations omitted]. For this reason, courts have traditionally held that summary judgment is inappropriate when

> 'questions of motive predominate in the inquiry of how big a role the protected behavior played' in the employment decisions. [Citations omitted] Without a searching inquiry into these motives, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of *post hoc* rationalizations." 694 F.2d at page 646 [Emphasis provided].

Thus, for example, Rich's convening the Wilson-Price investigation of appellant in September, 1978, three years after the Feigen Report, and after another administrative committee reviewing other unrelated work of Lucas had found grounds for imposition of formal sanctions, is an employment decision which must be carefully examined, because of its substantial chilling effect on appellant. Peacock, *supra*. White v. Davis, *supra*. Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

The content of the investigations of

appellant--what was considered, when and why--is obviously relevant, if there is to be an assessment of the true motive and intent behind them, rather than uncritical *post hoc* rationalizations for them. Evidence of these investigations is clearly admissible to show the nature and extent of the chilling behavior, and the presence or absence of any permissible reason for undertaking these adverse employment actions, contemporaneously with appellant's attempted exercise of his contractually protected right of academic inquiry.

Therefore, in the instant case, justice demands, and "a fair resolution of these difficult issues requires a full trial on the merits"[17], not summary adjudication by a bastardized procedure, labelled a motion to limit the scope of

---

[17] Peacock v. Duval, *supra*, at 647.

trial *in limine*.

Excerpt from Petitioner's Reply To Respondents' Answers To Petition For Review of Decision of the Court of Appeal, Sixth Appellate District.

"In addition, Petitioner calls to this Court's attention the definition of Academic Freedom adopted by the United States Supreme Court in Edwards v. Aquillard, _ U.S._, 55 U.S.L.W. 4860 (1987), decided following the submission of the Petition for Review.

"Academic Freedom "in common parlance" refers to "enhancing the freedom of teachers to teach what they will"[1]. Thus, Academic Freedom, derived from the First Amendment and the California Con-

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[1] In footnote 6, the Supreme Court cites with approval to The Court of Appeals definition: "'Academic Freedom embodies the principle that individual instructors are at liberty to teach that which they deem appropriate in the exercise of their professional judgment.' 765 F.2d, at 1257." Edwards, *supra*.

stitution (See, White v. Davis, 13 Cal.3d. 757,767 (1975)), is Petitioner's personal constitutional right to seek the truth in the manner Petitioner sees fit to do so and in the scientific area[2] Petitioner sees fit to investigate.

"Petitioner recognizes that Constitutional rights are not absolute. Indeed, Respondents have invoked California Constitutional Right of Privacy in this case to justify non-disclosure.[3] At minimum, this case

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[2] The Supreme Court's characterization of Academic Freedom as "commonly understood" has important implications for the process of determining Petitioner's rights and duties under his oral contract of employment with Stanford, because Courts look to the 'customs' of the University to construe the contract. Green v. Howard University, 412 F.2d. 1128, 1135 (1969).

[3] As will be shown below, the claim on behalf of Dr. Lucas' right of privacy in the Feigen and Raffel Committee Reports is misplaced. The rights implicated were Petitioner's.

presents a conflict of claims between two recognized constitutional rights. Such a conflict presents a clear issue for this Court to review meeting the criterion of Rule 29(a): settlement of important questions of law."

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-702

In The
# Supreme Court of the United States
October Term, 1987

EUGENE DONG, JR., M.D.,
*Plaintiff and Petitioner,*

vs.

THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, *et al.*,
*Defendants and Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 20, 1987

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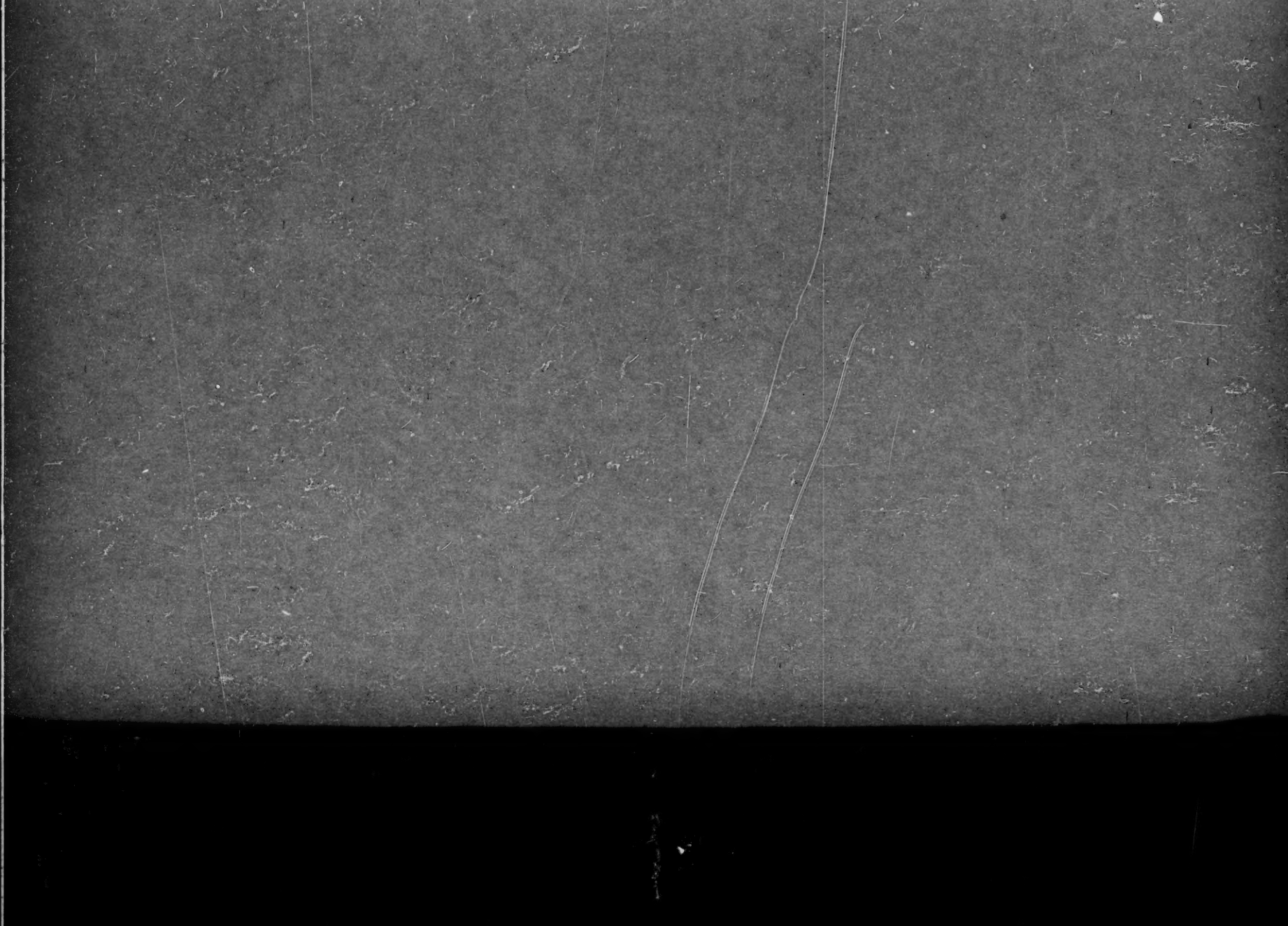

## I. ISSUES PRESENTED FOR REVIEW

1. Does one have a federal Constitutional right to base a state common law defamation claim upon a publication found (correctly—or even incorrectly) to be non-actionable opinion under state common law?

2. Does one have a federal Constitutional right to introduce evidence ruled (correctly—or even incorrectly) irrelevant under state evidence law to claims purportedly made under state common law?

TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I. | ISSUES PRESENTED FOR REVIEW | i |
| | TABLE OF CONTENTS | ii |
| | TABLE OF AUTHORITIES | iii |
| II. | INTRODUCTION | 1 |
| III. | STATEMENT OF THE CASE | 2 |
| IV. | SUMMARY OF ARGUMENT AND ARGUMENT | 7 |
| | A. Observations About Fact And Opinion | 7 |
| | B. Observations About Academic Freedom | 9 |
| CONCLUSION | | 10 |

# TABLE OF AUTHORITIES

Page

CASES:

*Board of Trustees v. Superior Court*, 119 Cal. App. 3d 516 (1981) ..... 1, 2

*Gertz v. Robert Welch*, 418 U.S. 328 (1974) ..... 8

OTHER AUTHORITIES:

Restatement of Torts, § 566 ..... 8

United States Supreme Court Rule 17 ..... 1

Federal Rule 403 ..... 6

## II. INTRODUCTION

Petitioner's claims against the Stanford respondents[1] were for emotional distress and alleged breach of the covenant of good faith and fair dealing. One State Court of Appeal found those claims "almost exquisitely preposterous." *Dong v. Board of Trustees,* ("Dong II"), Appendix to Petition, p. 43. Petitioner added that he was distressed by an investigation which vindicated him. An earlier State Court of Appeal looked at that notion (and others) in connection with a discovery dispute, and found there was "no argument in reason" to support it. *Board of Trustees v. Superior Court,* 119 Cal. App. 3d 516, 528 (1981) ("Dong I").

Petitioner's claims are indeed preposterous, and there is no argument in reason to support them. They are in any event state common law claims, and in this Court are based upon alleged errors in state court evidentiary rulings upon *in limine* motions in respect to those state law claims. The Petition presents no federal question, much less "special and important reasons" for review under Supreme Court Rule 17 or otherwise.

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[1] The "Stanford respondents" are the respondents other than Dr. Lucas. They are the Board of Trustees of Leland Stanford Junior University; Dr. Clayton Rich (former Dean of the Stanford Medical School); John Schwartz, Esq. (Vice President and General Counsel of Stanford); and Dr. James B.D. Mark (former acting chair of the Department of Surgery at the Medical School).

## III. STATEMENT OF THE CASE

### A. The Facts

Drs. Dong and Lucas were members of the faculty of Stanford's Medical School. Lucas worked in the Department of Surgery; his field was kidney transplants. Dong worked in the Department of Cardiovascular Surgery; his field was heart transplants. Dong and Lucas each had medical students and postgraduate fellows working for him.

In early 1972 Drs. Dong and Lucas quarreled over two graduate students' time. Relations between them went from "chilly" to "frigid" by June 1973. Then one of Lucas' research associates, Dr. Morris, told Dong that Lucas had not experimented on all the rats his publications said he had. Thereupon Dong wrote a memo to the Chair of the Department of Surgery that "made complaint . . . against Dr. Lucas, charging research misconduct and seriously impugning his personal and professional integrity." *Dong I*, 119 Cal. App. 3d at 522.

"Successive faculty committees [at Stanford] were appointed to investigate that, and other, complaints [by Dong] against Dr. Lucas"; indeed, "five years of complaints and recriminations" followed. *Dong I*, 119 Cal. App. 3d at 522-23.

Dong did not confine his complaints about Lucas' rats to University committees. He also brought his charges to the attention of the National Institute of Health, Senator Kennedy, the U.S. Attorney, the FBI, two professional journals, the American Association of University Professors, and the San Francisco Bay Area press. Then he wrote a book about, among other things, Lucas and

his rats. The idea that Dong's academic freedom with respect to Dr. Lucas was impaired (Petition, pp. 36-41) is, to say the least, fantasy.

Lucas on his part had sent some charges against Dr. Dong to one of the committees that was investigating him, Lucas, but the committee did not consider them. Lucas filed those same charges again a few years later, and another committee did look at them briefly. Those are the charges which the Petition claims were fact, not opinion. (Petition, pp. 15-36)

The upshot of all these charges and countercharges within the University was this: Dong was vindicated, and Lucas was punished. Lucas' charges against Dong were dismissed by the committee which looked at them, forthwith. Lucas was found guilty of misconduct in misstating bibliographies given to the NIH and of incompetence in connection with research. Accordingly, in February 1979 Stanford suspended Lucas for 12 weeks without pay and placed him on probation for two years. Lucas has since left Stanford. The University does not know where he is.

Dr. Dong was nevertheless unhappy with the result, and sued. He claimed that the charges Lucas had filed against him and which the University had dismissed had defamed him (first and second cause of action); that Stanford had defamed him and put him in a false light by, in general, failing to find Lucas guilty enough, early enough, and not telling the public and the NIH how guilty Lucas was (third cause of action); that distressed Dong (fourth and fifth causes of action); and that it also breached Dong's contract (sixth cause of action). (See *Dong II*, Appendix to Petition, pp. 23-26).

Petitioner adds that he used to be paid "commensurately with his peers," but now he is paid "at only the 25th percentile for associate professors at Stanford. . . ." (Petition, p. 3). Perhaps so. Petitioner does not report, however, that he has essentially done no teaching, research or clinical work in his field since 1977. Instead, he wrote a novel, appeared in a TV movie, went to law school, passed the bar, and spent his time writing about Dr. Lucas, this lawsuit and the like.

If he is paid less than other professors, that is why.

### B. Proceedings Below

Dong's defamation and privacy claims against Stanford were dismissed on summary judgment before trial (Dong did not appeal that ruling below and cannot here). That left Dong's defamation claim against Lucas, and his emotional distress and breach of contract claims against Stanford.

#### 1. The Claims Against Stanford

At trial Dong planned to introduce evidence of Lucas' rat research and Stanford's investigation of it to prove Dong's claims against Stanford. Specifically, Dong wanted to put in evidence these documents and testimony:

> The lab notebooks (partly in Japanese) of Dr. Enomoto, who used to work in Lucas' lab;
>
> A handwriting expert (who apparently did not read Japanese) to say these notebooks could have been altered;
>
> Martins, who was Lucas' adversary elsewhere, to say why he thought Lucas and Enomoto worked on fewer

rats than they said they did while Martins worked in Lucas' lab on his own animals;

Morris, Lucas' former lab assistant, to say why he thought Lucas did not work on as many rats as Lucas said he did and why Morris thought Lucas had not labeled the animals' blood properly in 1970;

Dong's own charges against Lucas which he had filed with the University, numbering more than 50 single-spaced pages, plus the University's confidential reports as to all charges against Lucas;

The Medical School's current dean, former dean, counsel, former associate counsel, associate dean, department chair and others, all of whom Dong had noticed to appear for interrogation regarding those confidential reports on Lucas and the investigation of Lucas that related to them;

NIH memos relating to Stanford's communications about the investigation of Lucas, and which the trial court had held absolutely privileged—to which Dong agreed.

Thus Dong offered to prove that Lucas had not reported his rat experiments correctly and that Stanford had not found him guilty enough, early enough. This, however, was Dong's case, not Lucas' case, and it was supposed to be about what was done to Dong, not Lucas. Accordingly, Stanford moved *in limine* to exclude that evidence.

The trial court granted the motion upon the grounds, among others,[2] that it was not relevant "and even if rele-

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[2] The trial court also recognized the California Constitutional right to privacy (RT 31) and found NIH documents embodying Stanford's communications to the NIH privileged. (RT 41) Petitioner agreed "you cannot sue or create or base a cause of action on communications with the NIH." (RT 39, ll. 19-24)

vant under 352 of the Evidence Code [like Federal Rule 403] the danger of confusing the jury and taking up additional time on evidence that is so marginally relevant and has so little probative value is unwarranted." (RT 31, 38, 41)

Stanford also moved *in limine* to exclude evidence of the investigations that had vindicated Dong. Dong advised the Court that it did not matter how the Court ruled on that motion, because he could not prove his alleged case as to the Dong investigations without proving his case about Lucas' rat experiments. (RT 43) The Court granted the motion. (RT 48)

### 2. The Claims Against Lucas

Lucas moved *in limine* to exclude his letters charging that Dong may have committed scientific improprieties on the ground that they set forth opinions, not statements of fact. Dong advised that the Court should take the letters "as a whole", not line by line, in making that determination. The Court agreed, and ruled that "clearly taken as a whole this is opinion rather than fact. . . . " (RT 21-22).

Dong also claims here that Stanford is responsible for Lucas' alleged defamatory opinion on a respondeat superior theory, although he dropped that claim in the Court of Appeal.[3]

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[3] There is also nothing to the claim. The claim is based on the letters Lucas sent to the University charging that Dong may be guilty of scientific improprieties. Dr. Dong in fact claimed that a professor has a duty to bring such charges to the University's attention, and that the University has a duty to receive

(Continued on following page)

### 3. The Court's Rulings

After the Court's *in limine* rulings, petitioner asked it to enter judgment of nonsuit against him. (RT 41-42, 48-49) Respondents stipulated to that, noting that they believed petitioner had no claim before or after the Court's rulings *in limine*. (RT 52) The Court entered the judgment of nonsuit for which petitioner had asked.

The Court of Appeal affirmed the judgment, and the Supreme Court of California denied a petition for hearing. This petition followed.

———o———

## IV. SUMMARY OF ARGUMENT AND ARGUMENT

Petitioner's observations about the difference between fact and opinion are wrong and in any event identify no ground for review. (A, below) Petitioner's observations about academic freedom are, as the Court of Appeals put it, "absurd", and also identify no ground for review. (B, below)

### A. Observations About Fact And Opinion

Petitioner points out that the California Supreme Court has adopted the "totality of the circumstances test"

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(Continued from previous page)

and look into those charges. Stanford cannot be liable for discharging the duty Dong claimed it had. Moreover, as a matter of common sense a University cannot be liable for receiving charges of one faculty member against another. For if it could not receive them, it could not discharge its duty to look into them.

for distinguishing fact and opinion, and complains that the "difficulty" with that test is that "the factors described are merely tools of linguistic analysis." (Petition, p. 17)

However:

(1) Petitioner told the trial court and the California Supreme Court[4] that the "totality of the circumstances" test was the right test (p. 6, above), and it is. Restatement of Torts, § 566.

(2) Petitioner does not say how that test was misapplied here, and it was not.

(3) It would make no difference whether the test were wrong or misapplied, because (a) it is a state common law test, and (b) because the State found that petitioner had no defamation claim under it.

In some circumstances the Constitution may prohibit a state from entertaining a defamation claim for damages based upon what under federal law is the expression of opinion, not fact. *See, e.g., Gertz v. Robert Welch,* 418 U.S. 328, 339-40 (1974). But no constitutional precept *requires* a state to entertain a defamation claim for what under state law is the expression of opinion, not fact, whether or not under federal law the expression is opinion or fact. Indeed, no constitutional precept requires a state to entertain a claim for defamation (or other state torts) at all.

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[4] He told the Supreme Court, for example, that "the questioned publication must be considered in its entirety." (Pet. for Hearing, pp. 16-17).

**B. Observations About Academic Freedom**

Petitioner apparently complains that the First Amendment is somehow offended where (1) one university professor "charges" another with fraud, and (2) the University does not thereupon deliver the charged professor's private papers to his accuser. (Petition, p. 40)

However: (1) The proposition is an "absurdity." (*Dong II,* Appendix to Petition, p. 45) (2) Petitioner's complaint is directed to an evidentiary ruling upon a motion *in limine.* The ruling was based upon the ground, among others, that the evidence petitioner offered was irrelevant to any element of his alleged common law claims. (*Dong II,* Appendix to Petition, p. 43-44) That ruling was plainly right; petitioner does not say how it was not right; and petitioner would present no federal question even if it were wrong.

Petitioner concludes with a request for an advisory ruling. (Petition, pp. 41-43) He is not entitled to it. (Constitution, Article III)

———o———

## CONCLUSION

This lawsuit should end. The petition should be denied.

Respectfully submitted,

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED FOR REVIEW

Insofar as defendant and respondent Zoltan Lucas, M.D. ("Dr. Lucas") is concerned, the issue is whether plaintiff and petitioner Eugene Dong, Jr., M.D. ("Dr. Dong") has a federal Constitutional right to pursue a state common law defamation claim, based upon writings authored by Dr. Lucas which were found to be non-actionable opinion under state common law.

TABLE OF CONTENTS


| | Page |
|---|---|
| I. ISSUES PRESENTED FOR REVIEW | i, 1 |
| II. STATEMENT OF THE CASE | 1 |
| (a) Facts | 1 |
| (b) Proceedings Below | 2 |
| III. ARGUMENT | 4 |
| CONCLUSION | 5 |

# TABLE OF AUTHORITIES

Page

## Cases Cited

*Baker v. Los Angeles Hearld Examiner* (1986) 42 Cal.3d 254 ..... 4

*Dong v. Board of Trustees* (1987) 191 Cal.App.3d 1572 ..... 3

*Ollman v. Evans* (1984) 750 F.2d 970 ..... 4

## I. ISSUES PRESENTED FOR REVIEW

Insofar as defendant and respondent Zoltan Lucas, M.D. ("Dr. Lucas") is concerned, the issue is whether plaintiff and petitioner Eugene Dong, Jr., M.D. ("Dr. Dong") has a federal Constitutional right to pursue a state common law defamation claim, based upon writings authored by Dr. Lucas which were found to be non-actionable opinion under state common law.

## II. STATEMENT OF THE CASE

**(a) Facts:** Dr. Dong and Dr. Lucas were members of the faculty of the Stanford University Medical School, the former working in the field of heart transplants, and the latter working in the area of kidney transplants. Beginning in the early 1970's, Dr. Dong aggressively encouraged and pursued various investigations of Dr. Lucas' professional integrity.

In early 1975, at the urging of Dr. Dong, Dr. James Mark (the then acting chair of the Department of Surgery of the Stanford School of Medicine) appointed an *ad hoc* faculty committee (the "Feigen Committee") to look into Dr. Dong's latest charges. On July 24, 1975, Dr. Lucas sent a five page letter to the chair of the committee, which requested investigation of certain charges against Dr. Dong. Those charges, and the factual bases for each of them, were outlined in the letter for the consideration of the members of the committee. While it is true that Dr. Lucas used the phrases "public fraud," "scientific fraud" and "consumer fraud" in that letter, it is also true that he carefully delineated the

factual foundations for his allegations and he repeatedly used cautionary phrases such as "I wish to suggest," "It may reasonably be argued," "I suggest," "I believe" and "I think." Indeed, after using the phrase "public fraud" at one point in the letter, Dr. Lucas stated: "I am not a lawyer and I use the latter terminology *only to make a case* that parallels Dong's letter to the Feigen Committee." (Emphasis added.) The Feigen Committee did not investigate the charges against Dr. Dong.

In 1977, Dean Clayton Rich of the Stanford University School of Medicine appointed another *ad hoc* committee (the "Wilson Committee") to investigate some new charges against Dr. Lucas, which Dr. Dong had originally submitted to the United States Senator Edward Kennedy. On June 6, 1978, Dr. Lucas sent a two page letter to Dean Rich, in which he objected to Dr. Dong's behavior and requested the formation of an extra-departmental peer committee to evaluate Dr. Lucas' charges that Dr. Dong's activities violated good scientific practice and constituted "consumer fraud." Dean Rich thereafter sent Dr. Lucas' charges to the Wilson Committee, which concluded after a brief review of the letter that there was insufficient evidence to pursue them and they were effectively dismissed.

Dr. Lucas was eventually found guilty of misconduct by the Wilson Committee and in February of 1979 Stanford suspended him for 12 weeks without pay and placed him on probation for two years. No action was taken against Dr. Dong.

**(b) Proceedings Below:** Dr. Dong filed his original Complaint against Dr. Lucas and the other defendants/respondents in the Superior Court of the State of

California, in the County of Santa Clara, on June 5, 1979. A First Amended Complaint was filed on September 17, 1979. Dr. Lucas was named in several causes of action, but in essence Dr. Dong alleged that he was defamed by the 1975 and 1978 letters written by Dr. Lucas.

The action was called for trial in the Santa Clara County Superior Court on November 13, 1984, at which time Dr. Lucas made a motion *in limine* for an evidentiary ruling that the 1975 and 1978 letters should be excluded, on the ground that they were statements of opinion, which are not actionable under California law. The trial court judge granted the motion, ruling that the letters, taken as a whole, were indeed statements of opinion and that they were therefore inadmissible. As a result of that ruling, and the Court's ruling on the *in limine* motions made by the other defendants/respondents, counsel for Dr. Dong conceded that they would be unable to make a *prima facie* case and they offered to stipulate to a non-suit.

Following entry of judgment, Dr. Dong took an appeal to the Sixth Appellate District of the Court of Appeal of the State of California. Following briefing and oral argument, the Court of Appeal affirmed the trial court's rulings and on May 6, 1987, the Court published its opinion in *Dong v. Board of Trustees* (1987) 191 Cal.App.3d 1572.

Dr. Dong's Petition for Reconsideration, filed with the Court of Appeal, was summarily denied, as was his Petition for Review, filed with the Supreme Court of the State of California.

## III. ARGUMENT

Dr. Dong's Petition is 43 pages long, and nearly half of it consists of a rambling argument in which he attempts to attack the lower courts' rulings that Dr. Lucas' 1975 and 1978 letters constituted statements of opinion, and not fact. Although Dr. Dong has attempted to frame Constitutional issues, he has actually done nothing more than argue various points of state law, such as: whether the "totality of the circumstances" test (enunciated in *Ollman v. Evans* (1984) 750 F.2d 970 and in *Baker v. Los Angeles Hearld Examiner* (1986) 42 Cal.3d 254) is an appropriate method for making the opinion/fact distinction; whether or not that distinction is to be left to the Court or to the jury; whether the Restatement approach to the opinion/fact distinction is appropriate, or was applied properly in this case; and whether it was appropriate for the trial court to make the opinion/fact distinction by ruling on a motion *in limine*. None of these questions involve First Amendment or any other Constitutional issues. They involve only state common law.

Dr. Dong filed a defamation lawsuit against Dr. Lucas, and that claim was based purely on the common law of the State of California. Dr. Dong's claims against Dr. Lucas were not based on any rights *conferred* by the Constitution of the United States. In defending himself, Dr. Lucas argued that his letters were statements of opinion and were therefore inadmissible. The trial court, and the California Court of Appeal and Supreme Court, agreed and upheld *Dr. Lucas'* claim of constitutional protection.

Dr. Dong, not having raised any Constitutional issues on his own, is now asking this Court to tell the

State of California how to formulate its substantive and procedural common law on defamation, which, it is respectfully submitted, is outside the appropriate scope of review by this Court.

## CONCLUSION

Defendant and respondent, ZOLTAN LUCAS, M.D., respectfully requests that the Petition be denied.

DATED: December 1, 1987.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-702

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

EUGENE DONG, JR., M.D.
Petitioner,

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

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**PETITIONER'S REPLY MEMORANDUM**
**APPENDIX D**

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## Misrepresentation and Responsibility in Medical Research

Robert L. Engler, James W. Covell, Paul J. Friedman, Philip S. Kitcher, and Richard M. Peters

**Abstract**: Early in 1985, after being questioned about duplicate data in two of his papers, Robert A. Slutsky, M.D., resigned his appointments as a radiology resident (trainee) and nonsalaried associate clinical professor in the Department of Radiology at the University of California, San Diego. During the following year, faculty committees investigated Slutsky's entire bibliography of 137 articles published in 7 years; 77 (including reviews) were classified as valid, 48 were judged questionable, and 12 were deemed fraudulent. The majority of these papers were published while Slutsky was a research or clinical trainee in cardiology, nuclear medicine, and then radiology. Our analysis of this case leads us to conclude that research fraud, although probably rare, in view of the size of the research establishment, may evade detection, and that there are scientists prepared to run the appreciable risk of submitting inaccurate statements for publication.

Sophisticated dishonesty can escape detection by peer review and replication. The emphasis on competition and the pressure to produce, while intended to advance the discovery of truth, may foster a conflict between personal career goals and the intellectual motivation of scientists seek the truth.

The scientific community needs to address the issues raised by recent reports of fraud. Each institution and granting agency must have procedures for investigating suspected fraud or unethical practices, procedures that protect both the person who reports such practices and the accused person from premature disclosure. As we heighten awareness, we must avoid a "witch hunt." Deterrence of research fraud is clearly needed, but institution of practices that might stifle originality or discourage cooperative research would be counterproductive. (N. Engl. J. Med. 1987; 317:1383-9.)

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Early in 1985, a member of a departmental ad hoc committee evaluating the appointment of Robert A. Slutsky, M.D.,

as associate professor of radiology at the University of California, San Diego, raised some questions about apparently duplicated data in two articles by Slutsky. Within one month of being confronted with this problem, Slutsky had resigned his appointments as a radiology resident (trainee) and nonsalaried associate clinical professor in the Department of Radiology. In accordance with procedures established by the School of Medicine, an ad hoc committee was appointed to investigate the initial charges. This committee examined recently submitted or published papers and laboratory records and interviewed laboratory personnel and postdoctoral trainees. In the light of the evidence from laboratory logs and the testimony of technicians and coworkers, the committee found that three recent manuscripts contained descriptions of experiments that had clearly never been performed and requested retraction of the two papers that had been published [...]. The committee also recommended a full investigation. Before this investigation was complete, Slutsky's attorney requested retraction of 15 published papers in eight journals, explaining that "information had recently come to Dr. Slutsky's attention which cast some doubt on the results."

During the following year, a committee of 10 faculty members investigated Slutsky's entire bibliography of 137 articles published in seven years [...]; 77 (including 4 reviews) were classified as valid, 48 were judged questionable, and 12 were deemed fraudulent. The majority of these papers were published while Slutsky was a research or clinical trainee in cardiology, nuclear medicine, and then radiology. Examples of fraud include reporting numerous experiments that were never performed [...], reporting procedures that were incorrect or measurements that were never made [...], and reporting statistical analyses that were never performed [...]. Instances in which statistical calculation errors were apparent in the article were classified as questionable [...]. These facts were reported to the National Institutes of Health and other granting agencies and were released to the press and interested persons. Correspondence with coauthors and interviews with senior department faculty disclosed how this young investigator's fabrications had escaped detection for so long.

**What is Fraud?** Fraud, in our judgement, involved intentional misrepresentation. The perpetrator makes statements that are intended to induce others to believe things that he or she knows to be false. However, fraud is not the only kind of culpable misrepresentation. It is convenient to distinguish three ways in which inaccurate statements may be produced: (1) through justifiable mistakes - cases in which the scientist had no knowledge or basis for believing that the statements he or she was making were incorrect; (2) through careless errors - cases in which the scientist had no intent to deceive by the information would have provided reason to doubt the accuracy of the statements made was available; and (3) through fraud - cases in which the statements made were known by the scientist to be false and in which the scientist intended to deceive others. Justifiable mistakes do not raise the question of culpability. Careless errors and fraud involve a range of culpable actions, from negligence in the supervision of research or the execution or experiments to a clear intent to deceive.

After due consideration of what requirements and standards applied, the members of the second committee adopted the position that the ethos of scientific research requires that hypotheses be validated before they can be accepted and that claims to observation be open to scrutiny by peers. The legal principle of "innocent until proven guilty," which might be rephrased "assume correct until proved wrong," does not apply to scientific work; the burden of proof remains with those claiming new findings. Thus, the authors of a scientific publication that is reasonably alleged to be fraudulent bear the responsibility for establishing the accuracy of their results.

We assume the honesty of scientists until the first breach this trust. Since the first committee had found clear evidence of fraud in three papers, other could be accepted as valid only if other investigators could specifically vouch for the work. Because the committee had no reason to doubt the honesty of the 93 coauthors contacted, it agreed to accept their statements describing personal knowledge of the data from collection through publication as sufficient evidence of validity. When such statements could be made, the committee did not require reexamination of the original data and classified the publication as valid.

A classification as fraudulent required direct evidence of obvious misrepresentation. Otherwise, papers were classified as questionable. Although a questionable paper may not contain false information, the committee reported that accuracy could not be assured, because the committee had no confidence in Slutsky's scientific integrity and not combination of coauthors could vouch for the entire study from valid experiment to accurate report. If Slutsky processed some or all of the data completely independently, then the paper was likely to be labeled questionable.

The classification of questionable validity or fraud in papers with many coauthors raises the issue of the responsibility of the coauthors. Should the coauthors who were unable at the time of the committee review to vouch for parts of articles have had reason to wonder earlier about the accuracy of the statements made in their names? In multi-authored papers, can one expect, for example, the statistician to know exactly how the data were collected? Can a supervisor know what actually went on in the laboratory during every experiment? An unrealistic standard cannot be applied in judging the culpability of the coauthors. But the standard should be higher than that of many of Slutsky's coauthors and coauthors of others found guilty of fraud.1,2 In the absence of any intent to deceive, many have been careless about verifying the accuracy of publications that carry their names. We believe this to be a culpable degree of carelessness. Acceptance of a gift co-authorship (in which no scientific contribution was made) is also a culpable act of deliberate misrepresentation.

Subtle misrepresentation by omission could be a careless error or an act of fraud. Scientific texts are subject to conventions, understood by authors and by readers,1 that do not require the telling of the whole truth of every aspect of what went on in the laboratory (since that is evidently impossible) but that require the provision of complete information about certain facets of the activity. For example, Slutsky sometimes used the same figures in multiple manuscripts without citing the previous article. These could be considered "methods" figures, but the text often implied (without stating explicitly) that the data were from the current study.

Two kinds of motives may have a role in the performance and reporting of scientific work. Researchers are typically moved partly by intellectual motives - notably curiosity and a desire to acquire and disseminate new information. But personal motives - the desire for fame and fortune in their various degrees or for the advancement of some cause - cannot be ignored. Such personal concerns play a productive part in the advancement of science when they lead to actions in accord with intellectual motives. The congruence of personally and intellectually motivated actions benefits both society and investigator. Negligence and fraud arise when this happy congruence breaks down - when personal motives conflict with and overcome intellectual motives and scientific ethos.

It is tempting to explain instances of culpable misrepresentation by the "rotten apple" theory. The scientist who is at fault has subordinated intellectual ends to personal motives as a result of character flaws. Occasionally, fraud may represent a form of unconscious, perhaps self-destructive, behavior that may have aggressive components directed against supervisors, other authority figures, or colleagues.3 On the other hand, the "rotten system" theory suggests that the organization of scientific institutions is responsible. In our judgement, each of these theories is simplistic: broad social factors may generate situations in which personal motives, and the individual characteristics of scientists determine the relative priority they give to personal ends and the means they use to achieve them.

Nobody knows how frequently these conflicts occur. In the performance of research, it is tempting to forget an "anomalous" result, to fail to scrutinize data in a collaborative project, to leave the collection of data to a fast-working colleague known to be "sloppy," or to accept gift co-authorship. Although the ultimate responsibility for avoiding these temptations belongs to the individual scientist, there is much that research institutions and the society of biomedical research can do to diminish the conflict between personal and intellectual motives.

## How Is Fraud Detected?

Like Cyril Burt, Slutsky was a victim of his own statistical naivete. A scientist with more knowledge of statistics would have assigned different statistical properties to data sets that

were alleged to be empirically distinct. For several papers, recalculation of statistics with use of the methods cited failed to yield the claimed result. Yet, even with the gross statistical errors, the fraud would not have been unmasked had it not been for the reading of two of Slutsky's papers in quick succession by an astute reader able to spot the coincidence of tabulated values. Arguably, the papers could have been read independently for years without arousing any suspicion of inaccuracy, carelessness or fraud. These examples raise the question of exactly how common fraud is in biomedical science. The traditional reasons for assuming that fraud in science is rare are that the basic motivation of scientists is to seek truth and that detection will occur through peer review before publication or funding, or through failure by others to confirm the results. Reliance on scientific ethos, although presumably justified most of the time, ignores the possibility that personal and intellectual motives may not be congruent. We shall now show that detection by peer review or replication cannot be uniformly reliable.

**Peer Review**

Plausible, internally consistent fabrications, like those in the work of Darsee and Slutsky, cannot be detected by the peer-review system.2 However, in several of Slutsky's articles (Appendix, 4, 26, and 71) and in some of Darsee's papers,4 reviewers failed to detect incorrect statistical calculations and implausible technical accomplishments (Appendix, 4, 26, and 71). Why was the quality of some of these reviews deficient? In January 1987, a total of 752 articles was published in 26 of the journals in which Slutsky's articles appeared. Each of those articles, plus the articles that were rejected, required review by two or more qualified persons. Are there enough qualified reviewers? The review process is complicated by the sophistication and multiplicity of techniques employed in individual studies, especially in those such as Slutsky's, in which the research involved three clinical specialty areas - cardiology, nuclear medicine, and radiology.

Are we expecting too much of editors in requiring them to locate reviewers who are skilled in statistics, aware of the details of measurement of coronary blood flow with microspheres, and knowledgeable about technical information, such as the resolution of a new cardiac-imaging technique. Although even this

cursory analysis indicates that the peer-review system may be overloaded, we think it is largely effective in detecting internal inconsistencies. Such inconsistencies were rare in Slutsky's work. However, the failure to detect them in several cases indicates that the peer-review system and the training of referees deserve attention and that potential problems with the number of manuscripts need to be addressed. More open to abuse by fraudulent investigators are reports of symposia sponsored by pharmaceutical or instrumentation companies, since such documents are usually not peer-reviewed. Who selected the points of view in a symposium report? Who paid for its publication? Was it the subscribers (who are presumably motivated by wanting to know the results of the studies) or the drug company that wants to sell a drug to practitioners?

**Replication**: Replication, once an important element in science, is no longer an effective deterrent to fraud because the modern biomedical research system is structured to prevent replication—no to ensure it. It appears to be impossible to obtain funding for studies that are largely duplicative. Indeed, proposed federal legislation (H.R. 1708) would prohibit federal funding for any work deemed duplicative by a new federal agency. In addition, academic credit tends to be given only for new findings. Furthermore, attempted replication will detect only incorrect results; it will not detect correct results based on fraudulent data. In this regard, the cases of fraud that have figured prominently in the recent literature fall naturally into two categories. Occasionally, as in the case of Slutsky, the culprit does not play for high stakes. The goal is simply to establish a niche in the profession, and to this end, the papers announce results that are predictable extensions of basic work done by others. This strategy is relatively safe, because the perpetrator can expect that attempts at replication (should they be made) would reach sufficiently similar conclusions. Provided that the fabrication of the data set does not leave any clues - for example, in the form of peculiar statistical properties - the dishonesty will go undetected. Because of the number of methods of measurement in cardiovascular research, this field lends itself to this type of fraud. Some of Slutsky's work involved measurement of the effects of drugs on myocardial ischemia using newly

developed techniques such as computerized tomography; the results were reliably predictable from work that had used older methods.

The example of Mark Spector illustrates the other type of fraud5, in which a scientist convinced of the correctness of a new idea wrongly gambles that others will be able to "replicate" an imaginary result. The dishonesty may be successful if the scientist's theory is indeed correct and others provide real data to support the fictitious or inflated findings originally claimed to support the new hypothesis. If others' attempts at replication fail, the scientist may be able to plead, as both Spector and Darsee did, that the experiments were too delicate to work unless the experimenter had extremely subtle skills.

We conclude that peer review and replication will not always detect fraud, and that trust in a researcher's motivation ignores the ever-present dangers of conflict between personal and intellectual motives. The question that arises is, How can extensive fraud escape discovery for so long in a university laboratory where the investigator is closely surrounded by scientists and investigators?

**Who Are The Victims Of Fraud?**

The quality of medical care and the direction of clinical research could be affected by the publication of misleading data, such as those concerning the efficacy, side effects, and safety of new pharmacologic agents. Research funds and efforts could be misdirected. Considerable time and funding were wasted as a result of fraudulent publications by Darsee and by Slutsky. Public revelation of research fraud damages the whole scientific community. This may take many forms - from subtly influencing the career choices of scientists in training to altering funding patterns of public and private agencies. Reports of fraudulent behavior could conceivably encourage further fraudulent behavior.

Coauthors at several levels have been affected by the Slutsky affair. Young investigators who were trained in the laboratory at the time of the fraud have had to remove collaborative publications from their bibliographies and to live with the onus of having worked with a perpetrator of fraud. Among the most vulnerable were younger faculty members who were independent investigators at the time the fraudulent work was

performed but whose careers were not firmly established. Senior faculty may have their future opportunities for positions or funding compromised.

Thus, research fraud affects the careers of coauthors with varying levels of responsibility or culpability. Although many coauthors failed to show proper responsibility in regard to statements made in their name, such responsibility would have required a bold initiative on the part of a new research trainee not familiar with the unwritten guidelines for the conduct and publication of research. More senior investigators had the means to exercise responsibility. One of the important roles of a full investigation is to establish the validity of publications in which the untrustworthy person had no fraudulent influence, so that coauthors of those papers will not be wrongly blamed on the basis of association.

**How the University and the Scientific Community Fail Early Independence**

Independence is prized in academic circles, but premature independence in research can limit the learning of good research practices. Slutsky asserted independence early in his research training by assumin complete responsibility for designing projects and writing reports. That would have been worthy of praise, provided that his research supervisors has continued to oversee his projects and publications. As much as possible, however, Slutsky avoided review of his work by others, and he even ignored requests by coauthors to see data and manuscripts. Changing his specialty-training areas (from cardiology to nuclear medicine to radiology) and laboratories several times seemed to help him to avoid close, knowledgeable supervision and formal academic review, although he may simply have been following the best opportunities for productive research.

We conclude that research supervisors should encourage initiative but not complete independence until an investigator has demonstrated good research practices and ethics, as well as technical expertise. While maintaining a collaborative relationship as independence grows, the senior scientist should ensure that young investigator's ideas are correctly attributed to them. Each university or department should develop guidelines for the supervision and evaluation of research trainees, as well as

a policy on publication and authorship. Perhaps clinical subspecialties should develop training guidelines for research and teaching careers that provide formal training in experimental design, statistical analysis, and basic science, and thus differ from training primarily for careers in patient care, or perhaps formal training in the evaluation of experimental data should be an integral part of clinical training.

**Excessive Publication**

High research productivity is encouraged and rewarded in most academic institutions, and Slutsky's role models in cardiology and radiology had a great many papers published. Slutsky's incredible productivity (one paper every 10 days while he was simultaneously a radiology resident and an associate clinical professor of radiology) failed to raise alarm. Indeed, unreasonably high productivity was applauded by some coworkers and supervisors. On the other hand, many did not recognize Slutsky's excessive productivity for two reasons. First, his papers were published in a variety of journals in three separate sub-specialty areas, so that no one group reviewed all his work. Second, Slutsky created an appearance of high collaborative productivity by putting the names of colleagues and students on papers to which they had made little or no contribution. He involved others in sharing responsibility for his research, whether valid or invalid, by means of this supposed favor. Some coauthors were not aware of a publication until they were contacted by the investigating committee. In some cases, Slutsky forged signatures on journal's copyright-permission forms. One new research trainee was presented with a publication in which she was listed as a coauthor upon her arrival at the laboratory. Some colleagues and trainees were either too flattered or too embarrassed to have their names removed from papers to which they had not contributed, and many lacked the authority or willpower to resist this practice. On the other hand, some faculty members expected their names to be used even though they had provided only the facilities for a project, without making a substantive contribution to the work or having a knowledge of its validity. Thus, gift co-authorship was effectively a disguise for an impossible amount of work by one person.

Finally, although Slutsky showed his early supervisors his data summaries, he frequently sequestered original data. He would not produce lists of names of patients in clinical studies. In regard to papers in which Slutsky was the first author, coauthors rarely recalled seeing written comments of manuscript reviews. In retrospect, coauthors regretted their permissive attitude toward these "eccentricities." Although this abrogation of the responsibility of co-authorship enhanced the speed of publication, it removed a mechanism to detect fraud and allowed Slutsky to alter reported results or procedures to satisfy reviewers' critiques. Many of Slutsky's coauthors never saw raw data or even data summaries. Although collaborative relationships between coauthors must be based on trust, some joint data review should be an integral part of the research process, even when unique laboratory procedures necessitate long- distance collaboration.

It is obvious that creativity and quality in research ought to be prized above quantity, but unfortunately, this is not often the case. Senior investigators must remain at least partly responsible for the quality of work of junior colleagues. Integrity regarding criteria for authorship must be as integral a part of scientific publication as is the accuracy of the data, and all coauthors should exercise their responsibility for the quality and accuracy of a scientific publication. At the time of publication each investigator could be asked to specify his or her role in the research, and records of their reports could be maintained by each department for review at the time of promotions. Journals could require similar statements to be submitted along with the copyright-transfer form. This practice should clearly identify gift authorship and thereby limit it.

Departments could require the statements of contribution and approval of all submitted papers by all coauthors - a practice that would allow young investigators to voice an opinion concerning their role in research at the departmental level. Senior investigators should not put their names on work unless they actually provided ideas and reviewed data. Co-authorship should reflect scientific involvement and responsibility for the work reported.

Excessive production should be scrutinized because of the deleterious effect on quality when quantity is great. New faculty and trainees should be clearly informed of realistic performance expectations by the laboratory, the department, and the university. Most important, the emphasis of quality must be both de jure and de facto in promotion, academic review, academic rewards, and peer review of funding.

**Journals' Responsibility**

The review of publications by some journals was ineffective in detecting discrepancies in procedures and statistics, as well as implausible technical accomplishments. It might help if tables of data were submitted to reviewers, even if those tables were not to be included in the published article, so that the reviewer could judge whether a figure was a fair representation of the data. In view of the evident limitations of the peer-review system in detecting internally consistent fabrications and the necessity for trusting the integrity of scientific reporting, journal editors seem relatively powerless to prevent the type of fraud encountered in the Slutsky case.2 At a minimum, however, all journals should require signed approval of final manuscripts by all coauthors and should perhaps communicate with separately with each coauthor.

Journals play an important part after has been established. In both the Darsee and Slutsky cases, large numbers of publications and several coauthors were involved. Coauthors and institutions clearly share the responsibility for the reevaluation of the published work of an investigator shown to have committed fraud, and journals must be responsible for publishing the results of appropriate investigations. Not to review the work and not to publish the results of this is, in our opinion, an abrogation of responsibility. To a large extent both the Slutsky and the Darsee investigations have failed in this respect.

Very little of the investigation of Darsee's bibliography was made public.4 Although a committee investigated all of Slutsky's publications, this review was not an evaluation of scientific content but a search for direct evidence of fraudulent data and opportunities for Slutsky tc alter data in a paper. Since some journals are reluctant to publish retractions for legal or other reasons, publication of the committee's findings has been incomplete. For example, Circulation and other American Heart

Association journals will publish retractions only if they are agreed to by the authors - a policy that does not deal effectively with fraudulent behavior and ignores the possible conflict of interest of coauthors.

**Failure to Report Suspicions**

Although some of Slutsky's junior and extra-departmental colleagues (and even one journal editor) harbored suspicions about the validity of submitted manuscripts, they failed to communicate their concerns to the responsible department official (the chairperson), the responsible School of Medicine official (the associate dean), or other supervisors. Hints about unreasonable research accomplishments or careless techniques in letters of recommendation for Slutsky's appointment were never pursued by the Department of Radiology. When department members considered Slutsky's faculty appointment, they remained uninformed about concerns in the cardiology division about Slutsky's carelessness and unwillingness to share data. Furthermore, such concerns did not inhibit some of Slutsky's colleagues from having nominal collaboration with him.

Faculty and trainees should be informed of the policy and procedures for reporting on unethical research practices. It should be considered an academic obligation for faculty to inform supervisors if they have reservations about the integrity of the work of a faculty member or fellow.

**Failure to Retain Data**

Slutsky's original data simply could not be found, even in cases in which the studies had clearly been performed. There were not university regulations governing retention of research records and data. All university should establish standards and facilities for data retention.

## Conclusions

Our observations in this case lead us to conclude that research fraud, although probably rare in proportion to the large numbers of scientific publications, may escape detection or investigation and that there are scientists prepared to run the appreciable risks associated with making inaccurate statements in papers that bear their names. sophisticated dishonesty may not be detected by peer review or attempts to confirm results. Personal motives can lead researchers to make careless errors or to practice minor dishonesty or even outright fraud. Moreover, the emphasis on competition and the constant pressure to produce , while intended to advance the discovery of truth, are likely, in the present context, to foster conflict between personal career goals and the intellectual motivations of science.

Solutions to prevent research fraud are clearly needed but cannot be adopted quickly; to institute practices that might stifle originality or discourage co-operative research would be counter productive. Solutions to the problems of scientific fraud and irresponsibility require a more refined taxonomy of case, greater understanding of the harm they cause ("Does it really matter," the cynic asks, "if a cunning faker gets away with producing hundreds of papers that nobody reads?"), appreciation of the costs of changes in the structure of scientific research, and careful consideration of the goals that the scientific community seeks to achieve.

Appendix Dr. Slutsky's Bibliography

1. World J Surg 1978; 2:825-6. Valid
2. Exerc Sport Sci Review; 6:105-23. Valid
3. Radiology 1979; 132:155-9. Valid
4. Am J Cardiol 1979; 44:459-65. Questionable
5. Circulation 1979; 556-64. Valid
6. Circulation 1979; 565-71. Valid
7. Am J Cardiol 1979; 44:1365-70. Valid
8. J Nucl Med 1979; 20:491-5. Valid
9. Am J Cardiol 1979; 44:318-24. Valid
10. Circulation 1979; 60:1004-13. Valid
11. Cathet Cardiovasc Diag 1979; 5:305-17. Valid
12. Radiology 1980; 135:725-30. Questionable
13. Circulation 1980; 61:1083-90. Questionable
14. Am J Cardiol 1980; 45:63-71. Questionable
15. Am J Cardiol 1980; 45:831-40. Questionable
16. Am J Cardiol 1980; 46:813-30. Questionable
17. Am J Med 1980; 68:197-205. Valid
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*Articles Retracted by Dr. Slutsky

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